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University of Toronto-
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Joint Centre
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Canada - Hong Kong: Human Rights and Privacy Law Issues

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edited by William H. Angus and Johannes Chan

CANADA AND HONG KONG PAPERS NO. 4

Canada – Hong Kong:

Human Rights and Privacy Law Issues

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Papers presented at the Canada and Hong Kong Workshop
York University, 2 October 1992

Edited by
William H. Angus
and Johannes Chan

Canada and Hong Kong Papers No. 4

Joint Centre for Asia Pacific Studies
Toronto, 1994

Canada and Hong Kong Research Project
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Joint Centre for Asia Pacific Studies
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York University
4700 Keele Street
North York, Ontario
CANADA M3J 1P3

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ISBN 1-895296-01-3
Printed in Canada at the Coach House Printing Company.

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Calligraphy for cover design by Jerome Ch'en, York University

Introduction to the Series
Canada and Hong Kong Papers

This book is the fourth of a series published by the Canada and Hong Kong Project. The project was set up in 1990, in recognition of the importance of the growing relationship between Canada and Hong Kong. One of the exciting things about this project is the high level of interest that there is now in the relationship between Canada and Hong Kong and the enthusiasm which we have found for doing research on the subject. We have been able to attract a number of scholars and professional people with a detailed knowledge of Canada and Hong Kong to contribute to our series.

The books in this series examine various aspects of the relationship between Canada and Hong Kong in the period leading up to the return of Hong Kong to Chinese sovereignty in 1997. Over the past few years relations between Canada and Hong Kong have increased enormously and have been changed dramatically by the great wave of migration to Canada over the past decade. Since migration is the linchpin of the relationship, some of the books in the series focus on the emigration climate in Hong Kong and look at factors which encourage or inhibit migration. The focus of this fourth book in the series (and second on legal matters) is on the important issues of human rights and privacy law under Hong Kong's new Bill of Rights and a comparison with such concerns raised in Canada by the Canadian Charter of Rights and Freedoms.

In addition to the co-convenors of the second Legal Workshop, William Angus and Johannes Chan, we would like to express our appreciation to Wang Gungwu, Vice Chancellor of the University of Hong Kong; Peter Rhodes, Dean of the Faculty of Law at the University of Hong Kong; and Michael Welsh and Robert Desjardins of the Canadian Commission in Hong Kong, for their support in making this workshop a success. We also extend a special thank you to the referee who commented on the manuscript and to Jerome Ch'en, York University, who designed the calligraphy on our cover.

The Canada and Hong Kong Project is funded by the Donner Canadian Foundation. We would like to thank the Foundation for its generosity and for its steady, informed support.

Diana Lary and Bernard Luk
Co-Directors
Canada and Hong Kong Project

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Introduction: The Canadian Perspective

William H. Angus

The papers which follow in this volume are revised and edited versions of those presented to a workshop held at York University on 2 October 1992, in connection with the Hong Kong Festival in Toronto. This workshop was jointly organized by the Faculty of Law in the University of Hong Kong and the Canada and Hong Kong Project in the University of Toronto-York University Joint Centre for Asia Pacific Studies located at York University.

For the origins of this workshop, one must look back to two separate events in Hong Kong over a year earlier which were part of Festival Canada '91 there. In June 1991 a three day conference on the *Hong Kong Bill of Rights* was organized by the Faculty of Law in the University of Hong Kong.[1] Participants in this conference came from far and wide, and Canadian speakers contributed their analysis of the *Canadian Charter of Rights and Freedoms.*[2]

Close to one week later, a day long workshop, entitled "Canada-Hong Kong: Some Legal Considerations," was jointly organized by the Faculty of Law in the University of Hong Kong and the Canada and Hong Kong Project. It was also held at the University of Hong Kong. This initial workshop was devoted to papers on a variety of topics of mutual interest to the legal communities in Canada and Hong Kong.[3]

When a university education programme was included in the planning for the Hong Kong Festival in Toronto the following year, it seemed appropriate and timely that a second workshop, similar to the highly successful first one, be organized. Recent developments under the new *Hong Kong Bill of Rights* compared to experience with the *Canadian Charter of Rights and Freedoms* was a logical choice of topic flowing from the Bill of Rights conference in Hong Kong the previous year.

With a view to opening up some new ground at the second workshop, privacy law focusing on access to government information was selected as a second topic for the workshop. Human rights values of a rather specialized nature are at stake in the privacy law field. Looking ahead to July 1997, one can reasonably foresee that privacy law issues may become of considerable significance in Hong Kong. Both federal and provincial jurisdictions in Canada have taken legislative initiatives

in the privacy law field. So the field of privacy law, and particularly access to government information, was a natural choice as an additional topic for the workshop.

To introduce human rights and privacy law from a Canadian perspective, it would first seem necessary to review the background leading up to the present situation. Although related in many respects, human rights law and privacy law have developed somewhat separately in Canada and, therefore, will be given individual treatment.

Background

Although human rights provisions can be found in Canadian legislation as early as 1793,[4] the first comprehensive statute was the provincial *Saskatchewan Bill of Rights Act* passed in 1947.[5] It was not until 1962, however, that the first human rights code was enacted in the Province of Ontario,[6] with other provinces and the federal government following suit in due course.[7]

On the national scene, the Parliament of Canada enacted the *Canadian Bill of Rights* in 1960.[8] As a simple statute of the federal Parliament, it applied to federal laws only.[9] Furthermore, Canadian courts proved reluctant to apply the *Canadian Bill of Rights*, principally because it lacked a clear constitutional mandate for the courts to limit the traditional sovereignty of Parliament.[10] Thus, this first federal venture turned out to be decidedly ineffective as a human rights vehicle.

From this mixed bag of federal and provincial legislation emerged the *Canadian Charter of Rights and Freedoms* in 1982, known universally in Canada as "the Charter."[11] First of all, it should be noted that the Charter is entrenched as part of the Canadian constitution. Secondly, it expressly overrides inconsistent statutes. Thirdly, it applies to both federal and provincial levels of government.[12] Generally, the Charter sets forth guarantees for the protection of civil liberties, provision for judicial review of alleged Charter violations, and remedies for any breach thereof.

In contrast to the ineffectiveness of the *Canadian Bill of Rights*, the Charter has been applied frequently by Canadian courts, particularly in the earlier years of its existence.[13] More recently, however, the judiciary has exercised measured restraint about invoking it. Nevertheless, the Charter clearly has and will continue to have a very significant impact on human rights in Canada. Parliament and the provincial legislatures are ever mindful of Charter requirements, government administrators

are careful to observe its dictates, academic and popular writers have produced an enormous quantity of published literature on the topic,[14] and Canadians generally seem well aware of its existence and potential as protection against the excesses of government.

With respect to privacy law, the federal Parliament took the initiative through specific provisions in its federal *Human Rights Act* of 1977.[15] Rights of access and correction as well as duties of fair information were imposed on federal authorities, and the office of the Privacy Commissioner was established.[16] This ground breaking legislation was replaced in 1982 by two new pieces of federal legislation, the *Access to Information Act*[17] and the *Privacy Act*[18], which continue in force presently at the federal level. However, recent criticisms of the access legislation as outdated and cumbersome have prompted the federal Minister of Justice to promise an overhaul of that statute.[19]

Access and privacy statutes have also been enacted in most of the provinces to cover areas within provincial legislative jurisdiction, commencing with Quebec in 1982[20] and most recently British Columbia in 1992.[21] In the Province of Ontario, access and privacy provisions covering provincial ministries and agencies were legislated in 1987[22] and extended to the municipal level of government by a companion statute in 1989.[23]

So the Canadian experience with access and privacy legislation is only a little over a decade old. Prior to its introduction, governments were not overly cooperative in revealing information in their possession, to say the least. Since the arrival of access statutes, however, there has been a noticeable softening of attitude and increased openness on the part of government. Nevertheless, resort to litigation by the media to obtain desired information has not been uncommon, particularly at the federal level. The privacy provisions have generated much less attention.[24]

As relatively brief as Canada's experience has been, it may still be of interest to the Hong Kong legal community if steps are taken there to introduce access to information and privacy protection. Informal discussions on the topic between persons from the two jurisdictions have already taken place apparently.

A Canadian Perspective on Hong Kong

As a general matter, Canadians have become particularly interested in Hong Kong since the 1980s because of the enormous increase in the flow of immigrants from there, which has brought significant

economic, social, and cultural benefit to Canada.[25] Of course, the prime motivation for this emigration – the shift of political authority to the People's Republic of China in 1997 – has not escaped Canadian attention. Both official and unofficial reaction in Canada to human rights violations in the PRC has been highly critical. Therefore, Canadians are very sympathetic to concerns about human rights and privacy in Hong Kong after 30 June 1997.

That the *Canadian Charter of Rights and Freedoms* influenced to some extent the drafting of the *Hong Kong Bill of Rights*[26] is perhaps not surprising. Both jurisdictions inherited the English common law, so they proceed from a common base. Both found the common law to be inadequate for the protection of human rights[27] and turned to more concrete instrumentalities. In view of the universality of human rights, social and cultural differences are immaterial. With somewhat similar protective provisions, each jurisdiction will, henceforth, benefit from the jurisprudence of the other. All in all, the interconnection is a positive feature for both.

With respect to privacy law and, particularly, access to government information, the Canadian legislative experience is quite recent, while Hong Kong does not have any significant statutory intervention. If Hong Kong does take legislative steps to fill the vacuum, then the various federal and provincial statutory provisions in Canada may be of interest and assistance. In view of the acknowledged deficiencies of the Canadian federal access to information legislation, Hong Kong would at least learn from Canada's mistakes. Furthermore, some of the Canadian provincial statutes have created independent regulatory authorities with more extensive powers to deal with access and privacy issues than is the situation under the Canadian federal legislation.[28] In any event, both Canada and Hong Kong have everything to gain and nothing to lose by sharing their respective experience on privacy law issues.

The Papers

Richard Cullen, author of the first paper whose title poses the rather provocative question "Canada leads, Hong Kong follows?", is particularly well qualified to consider both the Canadian and Hong Kong situations. Although an Australian who completed his first law degree in that country, he was awarded his doctoral law degree in Canada at Osgoode Hall Law School of York University. After returning to teach law in Australia, he became Acting Head in the Department of

Professional Legal Education at City Polytechnic of Hong Kong where he is still located. Thus, he brings an understanding of both Canadian and Hong Kong legal systems to the comparative consideration of human rights in the two jurisdictions.

Cullen's paper examines the circumstances relating to the introduction of the Canadian Charter and the Hong Kong Bill of Rights, looks at the legal impact of these documents on their respective legal cultures, and compares the case law which has arisen under each instrument. As for the answer to the intriguing question raised in the paper's title, it would destroy the suspense to disclose it here, so the reader is left to examine Cullen's piece from the beginning in order to follow his reasoning to its thoughtful conclusion.

The second paper is by Nihal Jayawickrama, whose initial legal education at the University of Ceylon was followed by a doctoral degree from the University of London. He subsequently accepted a teaching position in the Faculty of Law at the University of Hong Kong but at the time of the workshop was visiting for the academic year at the College of Law in the University of Saskatchewan. Dr. Jayawickrama had delivered a paper to the *Hong Kong Bill of Rights* conference held in Hong Kong in 1991.[29] His paper to the present legal workshop reflects his broad background on the international scene with particular experience in both Canadian and Hong Kong contexts.

Jayawickrama first explains in his paper the relationship between the Hong Kong Bill of Rights Ordinance 1991 and the International Covenant on Civil and Political Rights. He then proceeds to examine the manner in which the Hong Kong Court of Appeal has approached the task of interpreting the Bill of Rights, in particular the sources relied upon or ignored by that Court in determining the scope and content of the rights and freedoms. After considering the general approach taken by the Court, he addresses six specific sources of interpretation. Separate treatment is afforded the Court of Appeal decision in *Tam Hing Yee v. Wu Tai Wai*,[30] which he questions as an aberration. Jayawickrama's conclusion refers to the predisposition for Canadian jurisprudence in the Hong Kong Court of Appeal as contributing to the liberal approach so far adopted in its interpretation of the Bill of Rights.

For the third and final paper on access to government information in privacy law, Eva Lau's background includes full-time teaching in the Faculty of Law at the University of Hong Kong and practice as a solicitor of the Supreme Court of Hong Kong. More recently, she has come

to Canada and is qualifying for practice in the Province of Ontario. Thus, she also is in a position to view the topic from both Canadian and Hong Kong perspectives.

Lau focuses her paper on the access to government information side of privacy law. A brief introduction contrasts the relative abundance of Canadian legislation on the issue with the complete absence thereof in Hong Kong. She examines the inadequacies of the common law position, before considering four justifications for having a right to information. In this situation, Lau turns to Article 16 of the Hong Kong Bill of Rights on freedom of opinion and expression[31] to develop a position that the right of access to government information is enshrined there, subject only to limited restrictions. Lau then raises a problem in the Hong Kong context which will strike a resonant chord with Canadians, that of the dominant English language and the need for official bilingualism if the right of access to government information is to be meaningful. All in all, Lau's paper is an incisive and thoughtful look at a contemporary issue in the Hong Kong context.

Acknowledgements

First and foremost, this workshop and publication would not have been possible without the unstinting cooperation and participation of my co-editor Johannes Chan of the Faculty of Law at the University of Hong Kong. Johannes found the presenters of the workshop papers, secured travel funds for some of them, and co-edited the papers for publication.

Following the presentation of each paper at the workshop, a commentator led off the discussion with a few well chosen remarks. The commentators were Peter Hogg and John McCamus of Osgoode Hall Law School at York University and David Beatty of the Faculty of Law in the University of Toronto. Their presence despite the pressures of teaching and other commitments was much appreciated.

From the Canada and Hong Kong Project office, Janet Rubinoff filled a wide variety of indispensable roles including the preparation of the invitation list for the workshop, making arrangements for the physical facilities and amenities for the actual holding of the workshop, and perhaps most important of all, the final editing and preparation of the manuscripts for delivery to the printer. Assisting with this latter task while Janet went abroad was Louise Gunn.

The co-directors of the Project, Diana Lary and Bernard Luk, were also instrumental in enabling the workshop to be held. Diana was the

moving force behind both the first and second workshops before she ventured west to the University of British Columbia, whereupon Bernard very ably assumed responsibility out of the office in Toronto. Their support for the workshop and publication of the papers was essential.

Finally, the financial support of the Canadian and the Hong Kong offices of the Hong Kong Festival '92 Organizing Committee for the travel expenses of the paper presenters is gratefully acknowledged. For the expense of the workshop itself and the publication of the papers, the Donner Canadian Foundation is once again thanked for its generous funding of the Canada and Hong Kong Project in all its aspects, which thereby enabled this workshop and these papers to materialize.

Notes and References

1. The papers presented at this conference were subsequently published as J. Chan and Y. Ghai, eds., *The Hong Kong Bill of Rights: A Comparative Approach* (Singapore: Butterworths, 1993).

2. At Session V on the final afternoon of the conference, four papers were presented by Canadian speakers on various aspects of the Charter and human rights. See ibid.

3. These papers in revised and edited form were published as William H. Angus, ed., *Canada-Hong Kong: Some Legal Considerations* (Toronto, Joint Centre for Asia Pacific Studies, 1992).

4. "An Act to prevent the further introduction of Slaves and to limit the term of contracts for servitude within this Province," S.U.C. 1793 (2d Sess.), c. 7.

5. S.S. 1947, c. 35.

6. *The Ontario Human Rights Code*, S.O. 1961-62, c. 93.

7. For a review of these developments, see W.S. Tarnopolsky and W.F. Pentney, *Discrimination and the Law* (Toronto: Carswell, 1994), chap. 2; and I. Hunter, *Human Rights Legislation in Canada: Its Origin, Development and Interpretation* (1976), 15 West. Ont. L. Rev. 21.

8. S.C. 1960, c. 44. For a concise and helpful discussion of the *Canadian Bill of Rights*, see P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992), chap. 32, pp. 779-91.

9. S.C. 1960, c. 44, ss. 2, 5(2). See also discussion by Hogg, *Constitutional Law of Canada*, chap. 32.2, p. 781.

10. In this regard, see the remarks of Le Dain J. in *Regina v. Therens* [1985] 1 S.C.R. 613 at p. 639, and Hogg, *Constitutional Law of Canada*, pp. 784, 788-89. As noted by Hogg, during the twenty-two year period between the enactment of the *Canadian Bill of Rights* in 1960 and the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, only one Supreme Court of Canada case held that a statute was inoperative on the ground that the Bill of Rights had been breached, that being *Regina v. Drybones* [1970] S.C.R. 282.

11. Constitution Act, 1982, being Schedule B, Part I to the Canada Act 1982, U.K. Stats. 1982, c. 11.

12. Hogg, *Constitutional Law of Canada*, chap. 33, p. 793 *et seq.* provides a thorough textual analysis of the Charter, although many other works have been published on the topic.

13. Ibid., p. 794.

14. Some of the better known works are A.F. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985); P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987); G.-A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989); D. Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990); M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, Inc., 1989); and D.C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989). The foregoing does not include, of course, the wealth of articles in legal periodicals.

15. S.C. 1976-77, c. C-33, Part IV.

16. See J.D. McCamus, "Access to Information Held by the State and Privacy," in International Academy of Comparative Law, XIIIth International Congress, Montreal 1990: *General Reports* (Cowansville: Les Editions Yvon Blais Inc., 1992), p. 728.

17. S.C. 1980-81-82-83, c. 111, Sch. I; now R.S.C. 1985, c. A-1.

18. Ibid., Sch. II; now R.S.C. 1985, c. P-21.

19. "Information Access Slow, Report Finds," *The Globe and Mail*, 5 April 1994, p. 8; "Information Act Under Scrutiny," *The Globe and Mail*, 6 May 1994, p. 6; and "Rock Pledges Overhaul of Access Law," *The Globe and Mail*, 11 July 1994, p. 4.

20. *Access to Documents Held by Public Bodies*, S.Q. 1982, c. 30.

21. *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, c. 61, as amended by S.B.C. 1992, c. 82, S.B.C. 1993, c. 46 & c. 66. It is reviewed by G.J. Levine, "Freedom of Information and Protection of Privacy: B.C.'s New Legislation" (1993), 51 The Advocate 381-89.

22. *Freedom of Information and Protection of Privacy Act, 1987*, S.O. 1987, c. 25; now R.S.O. 1990, c. F.31.

23. *Municipal Freedom of Information and Protection of Privacy Act*, S.O. 1989, c. 63; now R.S.O. 1990, c. M.56. See John Mascarin, "An Overview of the Municipal Freedom of Information and Protection of Privacy Act, 1989" (1992), 7 M.P.L.R. (2d) 72-81.

24. For a general consideration of access to government information and privacy law in Canada, see C. McNairn and C. Woodbury, *Government Information: Access and Privacy* (Don Mills, ON: R. De Boo Publishers, 1989-, loose leaf).

25. Immigration to Canada from Hong Kong was a topic in the first workshop held in Hong Kong. See William H. Angus, "Coming and Going Under Immigration and Refugee Law," in *Canada-Hong Kong: Some Legal Considerations*, pp. 31-51.

26. Mentioned by a number of speakers at the Hong Kong Bill of Rights conference, see note 1.

27. For a description of the common law situation in Canada before the advent of human rights legislation and the Charter, see Tarnopolsky and Pentney, *Discrimination and the Law*, chap. 1: 1-26.

28. J.D. McCamus, "Access to Information Held by the State and Privacy," p. 728.

29. Dr. Jayawickrama's paper at the Hong Kong Bill of Rights conference was delivered in Session I and was entitled "The Hong Kong Bill of Rights: A Critical Analysis." See Chan and Ghai, eds., *The Hong Kong Bill of Rights.*

30. [1992] 1 H.K.L.R. 185 (C.A.), on appeal from [1991] 1 H.K.P.L.R. 1 (D.C.).

31. Article 16 is identical to Article 19 of the International Covenant on Civil and Political Rights.

Introduction: The Hong Kong Perspective

Johannes Chan

In the first Court of Appeal decision on the Hong Kong Bill of Rights, Mr. Justice Silke V-P. remarked that the enactment of the Hong Kong Bill of Rights marked the beginning of a new jurisprudential era.[1] Indeed it did. A huge body of case law has emerged since 8 June 1991, the date when the Bill of Rights came into operation. In March of 1993, the first Bill of Rights case reached the Privy Council.[2] It was an appeal from the Crown against the decision of Mr. Justice Duffy, who ordered a permanent stay of prosecution on the ground that, *inter alia*, the defendant's right to speedy trial was violated. There was a delay of over five years between the date of arrest and the date of the trial, and the offence was related to events which took place ten years ago. The appeal was dismissed without calling upon the respondent. The Privy Council, without making any decision on the Bill of Rights, opined that there were ample authorities to justify the stay under common law abuse of process.

Two weeks later, the Privy Council dismissed another appeal from the Crown, again without calling upon the respondent.[3] In this case, the respondent was charged with the offence of being in possession of something which was reasonably suspected of having been stolen or unlawfully obtained, and failing to provide a satisfactory account. The burden of providing a satisfactory account is on the accused. The relevant statutory provision was struck down by the Court of Appeal for having violated the right to be presumed innocent as guaranteed by Article 11(1) of the Bill of Rights. In its written judgment delivered on 19 May 1993, the Privy Council upheld the analysis and approach of the Hong Kong courts in interpreting the Bill of Rights but commented that the Canadian approach towards reverse onus clauses, as set out in the *R. v. Oakes*[4] case, was unnecessarily complicated.

In the same judgment, the Privy Council allowed the Crown's appeal in another case[5] concerning the constitutionality of certain provisions in the Drug Trafficking (Recovery of Proceeds) Ordinance, the effect of which is that a person is presumed to know that a particular arrangement is a laundering of drug trafficking proceeds if he knows that the person making the arrangement was carrying on or had carried on drug trafficking. The relevant provisions were struck down by the High

Court at first instance for being a violation of the presumption of innocence. In delivering the judgment of the Board, Lord Woolf set down the parameter of the Bill of Rights in these terms:

> While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature.[6]

This brief description will hopefully give a flavour of the vigorous development of the Hong Kong Bill of Rights. Being a British colony, Hong Kong has closely adhered, sometimes almost religiously, to English common law.[7] However, as English case law has very little to offer on the Bill of Rights, the Hong Kong courts have to look elsewhere for guidance in interpreting and giving effect to the Hong Kong Bill of Rights. Canada becomes the natural choice, partly because of the accessibility of Canadian decisions in Hong Kong and partly because of scepticism of traditional lawyers trained under the British common law system towards American jurisprudence. Canadian decisions were cited and followed in a large number of local cases and have exerted great influence on the early development of the Hong Kong Bill of Rights. It is against this background that Osgoode Hall Law School of York University and the Faculty of Law of the University of Hong Kong decided to organize jointly a workshop on a comparative study of the Canadian Charter and the Hong Kong Bill of Rights.

The seminar was held 2 October 1992 in Toronto as part of the Festival Hong Kong 92 in Canada. Three papers were presented in the seminar. They were subsequently revised and are reproduced in this volume.

Bill of Rights: Canada Leads, Hong Kong Follows?

This provocative paper by Dr. Richard Cullen is divided into five parts. After a brief introduction he examines the respective political back-

grounds leading to the enactment of the Canadian Charter and the Hong Kong Bill of Rights. The Canadian Charter is a "unity-building" device, which attempts to defuse the growth of separatist sentiment in Quebec and enjoys widespread public support. It forms part of the package for unifying the increasingly divisive Canada. In contrast, the Hong Kong Bill of Rights is a "confidence-saving" device which tries to reassure the people of Hong Kong of their future in the territory after the brutal suppression of the pro-democratic movement in Beijing in June 1989. The different political background to the enactment of the Charter and the Bill of Rights and the distinct political culture in which these two instruments operate have, as argued by Dr. Cullen in the third part of his paper, resulted in a completely different impact of these two instruments.

Until recently, the Charter has been exerting a centralizing influence in Canada and has made an immense impact on many aspects of Canadian society. However, the Hong Kong Bill of Rights has exerted its major impact only in criminal law. Dr. Cullen attributes this limited impact of the Bill of Rights to a number of factors inherent in the political-economic structure of Hong Kong. These include the lack of resources of the general public to resort to courts as a means of enforcing their rights, the judicial refusal to extend the Bill of Rights to inter-party civil litigation, the cultural reluctance to utilize the courts for settlement of a dispute, and the existence of a more effective and alternative mechanism within a non-democratic political system to address the concerns of the business elite.

Having set the scene, Dr. Cullen examines in greater detail in part four (Kindred Expeditions) the impact of Canadian decisions in two selected areas of criminal law – namely, the presumption of innocence and undue delay. He observes that the Canadian Supreme Court has resiled from its early stringent approach towards reverse onus provisions, which approach has heavily influenced the Hong Kong courts. The Supreme Court has shown more sympathy towards the prosecution in its recent decisions and seems to be more prepared to add qualifications to the tests laid down in the *Oakes* case. While it is too early to tell whether the Hong Kong court would follow the same trend, he projects that, given the widespread concern over the effectiveness of crime prevention here, the local courts were likely "to follow the relatively cautious path hewn by the Canadian Supreme Court in dealing with presumptive provisions."

Canadian decisions have been asserting an equally profound influence on the law of undue delay under the Hong Kong Bill of Rights. Some of the problems which besieged the Canadian courts, such as the appropriate remedy and the requirement of prejudice, have manifested themselves in Hong Kong jurisprudence.

Finally, Dr. Cullen concludes that while decisions under the Canadian Charter have exerted an important impact on Hong Kong in a few areas, notably in the area of criminal law, the impact on the whole is only limited. This is partly due to the completely different and unique social, political, and economic circumstances in which the Hong Kong Bill of Rights is to operate, and partly due to the hostile attitude of the People's Republic of China (PRC) towards the entire Bill of Rights regime.

The Role of the Privy Council

A brief observation on Dr. Cullen's paper concerns the role of the Privy Council, which is still the court of final appeal for Hong Kong. While local judges may display great sensitivity towards the ambit of jurisdiction they can exert, the lawlords on the Judicial Committee of the Privy Council, who are 8,000 miles away from the territory, may be operating in a completely different framework. On the one hand, the Privy Council may wish to build up a strong Bill of Rights jurisprudence before the termination of British sovereignty over Hong Kong. On the other hand, the lack of experience in interpreting a constitutional bill of rights in Britain may hamper the lawlords in carrying through the ideals of human rights legislation.[8] This tension is well illustrated in the latest decisions of the Privy Council. So far, the performance of the Privy Council is disappointing.

In *R. v. Charles Cheung Wai-bun*,[9] the defendant in the lower court argued that there was an abuse of process at common law by way of delay and a violation of his right to fair trial and right to be tried without undue delay under Articles 10 and 11 of the Bill of Rights. At first instance, Mr. Justice Duffy held that there was a violation of the right to speedy trial under the Bill of Rights as well as an abuse of process at common law. After a detailed discussion on the relationship between common law and the Bill of Rights, Mr. Justice Duffy held that there was no material distinction between them. This was contrary to an earlier decision by Judge Tyler, who held that there was a difference in the burden of proof between common law abuse of power and undue

delay under the Bill of Rights.[10] The Privy Council upheld the decision of Mr. Justice Duffy under common law abuse of process. On the important question of the relationship between common law abuse of process and undue delay under the Bill of Rights, the Privy Council has only this to offer:

> There remains in question as to whether Duffy J. was correct in saying that there is no material distinction between the onus on a defendant who seeks to have a prosecution stayed as being an abuse of process at common law and the onus which faces a defendant who wishes to establish that he is entitled to have the proceedings stayed under the Bill of Rights. Mr. Nicholls having accepted that, if there was any distinction between the approach at common law and under the Bill, this distinction could not avail him on this appeal their Lordships had to decide whether to determine this issue. In the circumstances their Lordships decided not to do so and did not call on Mr. Robertson Q.C. to address the Board as they had already decided that his help was not needed as to the outcome of the appeal. Their Lordships recognize that it is possible to argue that there is a difference of approach at common law and under the Bill. However, as any difference in the approach to be adopted is only likely to be of significance in a very small minority of applications for stay, their Lordships have decided that it is preferable not to determine the extent of the difference in this case, where it would be merely an academic exercise, but to leave it to be determined in a case where the existence of the difference would materially affect the result of the appeal. The issue is one which can be more satisfactorily examined in the context of a case where a difference in approach could have practical consequences.[11]

While this conclusion may be impeccable, it is disappointing that, given there are only a few cases to the Privy Council from Hong Kong each year, the Privy Council, being the court of final appeal of Hong Kong, did not seize this opportunity to deal with this question and provide guidelines to the Hong Kong courts.

However, in the second Bill of Rights case from Hong Kong, involving an appeal in two different cases,[12] the Privy Council could not avoid interpreting the Bill of Rights. The issue before the Privy Council was whether certain reverse onus provisions violated the presumption of innocence guarantee under Article 11(1) of the Bill of Rights. The Privy Council first confirmed the interpretation adopted by the Hong Kong Court of Appeal in *R. v. Sin Yau Ming*,[13] namely, that a broad and purposive approach should be adopted in interpreting the Bill of Rights. It also confirmed that, in interpreting the Bill of Rights, the

Hong Kong courts may refer to decisions in other common law jurisdictions, including Canada and the United States, and to judgments of the European Court of Human Rights. While these decisions may provide valuable guidance as to the proper approach to the interpretation of the Bill of Rights, the Privy Council rightly pointed out that they are of persuasive value only and should not be slavishly followed.

On the substantive issue, the Hong Kong court has adopted the tests developed by the Canadian courts in *R. v. Oakes*,[14] *R. v. Whyte*,[15] and *R. v. Chaulk*.[16] The effect of these tests is that so long as there exists a possibility that an accused may be convicted while a reasonable doubt exists, there is a *prima facie* violation of the right to presumption of innocence. The real concern is not whether the accused must disprove an element or prove an excuse. Indeed, the exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence is immaterial. Once there is a *prima facie* violation of the presumption of innocence, the Crown has the burden to justify the breach by showing that (a) the impugned provisions pursue a sufficiently important objective which is related to pressing and substantial concerns in a free and democratic society; (b) there is a rational connection between the objective and the means chosen; (c) the means adopted causes minimal impairment to the right or freedom in question; and (d) the effects on the limitation of rights and freedoms are proportional to the objective.

The Privy Council dismissed such an approach as unnecessarily complex. However, what is most disappointing is that it does not offer anything in substitution:

> ... it is their Lordships' opinion that, in applying the Hong Kong Bill, it is not necessary, at least in the vast majority of cases, to follow the somewhat complex process now established in Canada in order to assess whether an exception to the general rule that the burden of proof should rest upon the prosecution throughout a trial is justified. *Normally, by examining the substance of the statutory provision which is alleged to have been repealed by the Hong Kong Bill, it will be possible to come to a firm conclusion as to whether the provision has been repealed or not without too much difficulty and without going through the Canadian process of reasoning....* The court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated by Lawton L.J. [in *R. v. Edwards*].[17] If this is the situation, Article 11(1) is not contravened.

> In a case where there is real difficulty, where the case is close to the borderline, regard can be had to the approach now developed by the Canadian courts in respect of section 1 of their Charter. However in doing this the tests which have been identified in Canada do not need to be applied rigidly or cumulatively, nor need the results achieved be regarded as conclusive. They should be treated as providing useful general guidance in a case of difficulty [emphasis added].[18]

The Privy Council seems to suggest that all that is required is an intuitive approach: by examining the substance of a statutory provision, the court will be able to come to a firm conclusion as to whether there is a breach of the presumption of innocence. With great respect, this approach is intellectually lacking and methodologically unsound. It echoes the criticism that the length of equity depends on the length of the Chancellor's foot. It also overlooks the many types of reverse onus provisions which have troubled both the Hong Kong and the Canadian courts.[19]

The Canadian approach may be unnecessarily complex, but it does provide a useful analytical framework so long as the tests are not applied rigidly. Yet, by rejecting this analytical approach in the vast majority of cases, the Privy Council leaves Hong Kong courts with no guidance at all. While the Canadian approach may be adopted in the "borderline" cases, it begs the question of what a "borderline" case is. It throws the Hong Kong courts into the unnecessary turmoil of having to argue in each case whether it is a borderline case attracting the Canadian analysis. The situation is obviously unsatisfactory.

Throughout the judgment, the Privy Council spoke highly of the English common law and rejected almost all Canadian decisions. At the end of the judgment, it emphasized the need to approach the Bill of Rights with realism and good sense and to keep it in proportion.[20] It also echoed the common law traditional, and sometimes unwarranted, deference to the legislature, which clearly reflects a tradition where the legislature is supreme and its wisdom is not to be challenged in court by a constitutional Bill of Rights.

It is too early to tell what impact this Privy Council decision will have on the Hong Kong courts' attitude towards Canadian jurisprudence. No doubt it reinforces Dr. Cullen's conclusion that, in giving effect to the Hong Kong Bill of Rights, it will certainly not be that Canada leads and Hong Kong follows.

Interpreting the Hong Kong Bill of Rights

In the second paper, Professor Nihal Jayawickrama examines the approach adopted by the Hong Kong courts in interpreting the Bill of Rights and the materials relied upon by the courts in the first year of operation of the Bill of Rights. Having set out the broad and liberal approach adopted by the courts, which Professor Jayawickrama remarks is "both appropriate and timely," he then examines a variety of sources of interpretation and the reliance on these sources by the Hong Kong courts.

He concludes that the courts have been quite receptive to the General Comments and decisions of the Human Rights Committee and the decisions from the European Court and European Commission of Human Rights. However, little reference has been made to the jurisprudence of other international human rights tribunals or international human rights guidelines. As to the large number of bill of rights cases from the Commonwealth, the local courts have "demonstrated an exclusive partiality for Canadian judicial wisdom," despite the fact that the Canadian Charter is, in some respects, significantly different from the Hong Kong Bill of Rights.

In the last section, he discusses a local Court of Appeal decision[21] which adopted a more narrow approach in its treatment of international human rights materials. In conclusion, he warns that the local courts should be wary of drawing too close a parallel with the Canadian case authorities, which were decided in a different context and under different circumstances, and urges the local courts to seek actively jurisprudence from a wide variety of sources.

The Judges

An interesting point which is raised only marginally in this paper is the personal attitude of the members of the judiciary towards the Bill of Rights and its influence on the outcome of judicial decisions. Professor Jayawickrama points out that local judges "had stubbornly declined to familiarise themselves in advance with the emerging body of international human rights law." In the first international conference on the Bill of Rights which was organized by the University of Hong Kong within three weeks of the coming into operation of the Bill of Rights, only one High Court Judge and one District Judge participated in it. The District Judge happened to decide the first Bill of Rights decision in Hong Kong, which was eventually overruled by the Court of Appeal.[22] Recently, a leading member of the Bar, who condemned the

Bill of Rights in public during the drafting process, was appointed to the Court of Appeal.

To what extent does the personal attitude of the members of the judiciary towards the Bill of Rights affect the outcome of their decisions? Unlike their American colleagues, English lawyers generally pay little attention to the personal attitude of the members of the judiciary. In a classic common law system without a written constitution and characterised by a cautious, if not sceptical, attitude towards judicial law-making, the personal values of a judge may not be of great importance. However, in interpreting a constitution or a bill of rights, which contains provisions setting out vague and general principles only, there is ample room for judicial creativity and judicial law-making. A judge's personal views on the social, economic, and political system and his or her attitude towards the distribution of power between the legislature, the executive, and the judiciary may well influence a judge's decision on the most appropriate interpretation of a constitutional provision which may be susceptible to different possible interpretations. In construing the Bill of Rights now or the Basic Law in the future, the judiciary will have to grapple with the idea that constitutional interpretation is not a purely legal process. Whether judges like it or not, they are entering into the area of policy making and the wider political arena. The challenge for the judiciary is how to redefine their role in light of the new constitutional settings. Unfortunately, the judiciary does not seem to be ready for this task.

Right to Information and Freedom of Expression

Eva Lau touches on a substantive law aspect, namely, the right to information. She first points out that there was no statutory or common law right of access to information in Hong Kong. Even worse, the British government has extended the Official Secrets Act to Hong Kong, which restrains government officials from disclosing government information without prior authority. She then examines the justifications for a right to information, arguing that such a right is vital in order to ensure accountability of the government, to encourage and enhance meaningful public participation in the democratic process, to ensure fairness in the decision making process, and to realize the enjoyment of the right to privacy.

Article 16 of the Hong Kong Bill of Rights, which guarantees the right to freedom of expression and sets out permissible restrictions to this right, is then analyzed. Ms Lau argues that Article 16, by expressly

referring to the right to seek information, guarantees a right of access to government information. She also discusses the scope of various permissible restrictions.

The last section of her paper covers an interesting aspect of the right to information, namely, the problem of language. Having served on the Hong Kong Bilingual Laws Advisory Committee for a few years, Ms Lau gives a detailed account of the development of a bilingual system in Hong Kong, highlights the linguistic problem faced by the general public, which may not be familiar with the English language, in accessing governmental records, and argues that there should be mandatory translation of records containing personal information.

Access to Information and Official Secrets Act

Despite strong and repeated demands from the journalist profession, the Hong Kong government has still decided against the introduction of an Access to Information Ordinance. It was argued that such an ordinance was unnecessary, expensive, and counter-productive. A possible consequence was that civil servants would then refrain from keeping records, an argument which seems unsupported by practical experience elsewhere. The government's position seems to be that access to government information can be guaranteed by introducing appropriate administrative practice.[23]

However, administrative practice is certainly no substitute for a legal right, as procedure can easily be changed and there is no sanction for departing from such practice. Nonetheless, in light of the political sensitivity of enacting such a statute when 1997 is drawing near, and especially at a time when the Sino-British relationship is dominated by mutual distrust, it is quite unlikely that such a statute will ever be proposed. It remains to be seen whether a right of access to information can be derived from Article 16 of the Bill of Rights. Given the enormous legal costs involved in litigation, it is unlikely that the courts will have a chance to consider this issue in the near future.

The extension of the Official Secrets Act 1989 to Hong Kong is worth a closer examination. The Official Secrets Act 1911, which was part of the law of Hong Kong, had been severely criticized both in Britain and in Hong Kong. It was amended in 1989, but the amendment was not made applicable to Hong Kong at that time. It has been forcefully argued that, instead of extending the 1989 Act to Hong Kong, there should be enacted a local statute on both access to government information and protection of official secrets. It would be wrong to intro-

duce to Hong Kong the 1989 Act which, as many commentators in Britain have pointed out, is worse than its 1911 predecessor in many respects. Further, any English Act extended to Hong Kong will not be preserved after 1997. There is no point of extending an English Act to Hong Kong which could only last for a few years.

The government was not convinced, and the 1989 Act was extended to Hong Kong in 1991. A critic has suggested that the extension of an English Act which would not survive the change of sovereignty in 1997 is, in fact, a subtle means of removing any restriction on disclosure of government information after 1997.[24] This is a doubtful explanation, as the future Special Administrative Region is under a duty to enact laws to prohibit, *inter alia*, theft of state secrets,[25] which is wide enough, at least under Chinese law, to cover unauthorized disclosure of official information.

A more cynical explanation of the British decision is that the enactment of a local statute on access to information and protection of official secrets is too politically sensitive. Since the British administration is well protected under the 1989 Act, there is no reason why it should delve into this controversy when it can derive no practical benefit from the exercise. Should the government of the future Special Administrative Region decide that it needs the protection of an official secrets statute, it will be for the future sovereign power to handle the political controversies. In other words, the decision to extend the 1989 Act to Hong Kong is a deliberate decision on the part of the British government not to do anything in this sensitive and important area.

The right of access to information is only one aspect of the right to freedom of expression, the scope of which under the Bill of Rights has not been explored at all in Hong Kong. It may just be worthwhile to mention one particular development. The successful challenge at trial of the tobacco industry against the ban of tobacco advertising in Canada[26] has been watched with great interest in Hong Kong, as the Hong Kong government intends to introduce similar statutory restrictions here. The outcome of the appeal, one way or the other, would have major implications in Hong Kong.[27]

Epilogue

Given the constraint in time and resources, it was of course impossible to have a comprehensive study of all the various interesting aspects of the Canadian Charter and the Hong Kong Bill of Rights in the workshop seminar. For example, it would be interesting to examine the

impact of these instruments on administrative law, the governmental policy making process, or the role of the court vis-à-vis the legislature. The relationship between the Hong Kong Bill of Rights and the Basic Law of the future Hong Kong Special Administrative Region after 1997 will be another area of great academic and practical interest. These interesting and exciting areas, however, have to be, and I am sure will be, explored in the future.

May I also take this opportunity to thank all the contributors to this volume and both the Canadian and the Hong Kong offices of the Hong Kong Festival 92 Organizing Committee for their generous support in bringing the Hong Kong speakers to Toronto. Last but not least, I must express my deepest gratitude to Professor William Angus, who first suggested the idea of a joint seminar and then took upon himself the major share of all the tedious on-site organizational responsibilities, convened the seminar with great success, and oversaw the publication of this collection of papers.

Notes and References

1. *R. v. Sin Yau Ming* [1992] 1 H.K.C.L.R. 127.

2. *Attorney General v. Charles Cheung Wai-bun* (1993), 3 H.K.P.L.R. 62.

3. *R. v. Lee Kwong-kut* [1992] 2 H.K.C.L.R. 76 (C.A.); (1993), 3 H.K.P.L.R. 76 (P.C.). The appeal to the Privy Council was heard together with *R. v. Lo Chak-man.*

4. [1986] 1 S.C.R. 103.

5. *R. v. Lo Chak-man* (1993), 3 H.K.P.L.R. 76.

6. Ibid., at p. 100.

7. In a survey of cases cited in Hong Kong between 1974 and 1984, Professor Peter Wesley-Smith found that, on average, 74% of the cases cited are from England and 20% from Hong Kong. Cases from Australia, New Zealand, and Canada combined made up about 4% of the cases cited. Peter Wesley-Smith, "The Legal System, the Constitution, and the Future of Hong Kong" (1984), 14 *Hong Kong Law Journal* 137, at p. 140.

8. For a critical discussion on the performance of the Privy Council in interpreting a constitutional bill of rights, see K.D. Ewing, "A Bill of Rights: Lessons from the Privy Council," in *Edinburgh Essays in Public Law*, eds. W. Finnie et al. (Edinburgh: Edinburgh University Press, 1991), pp. 231-49.

9. See note 2.

10. *R. v. Fung Shu-shing* (1992), D.Ct., D.C. No. 777 of 1991 (14 May 1992), reported in *Bill of Rights Bulletin* 1, no. 4: 34. This decision is not binding on Mr. Justice Duffy. For further discussion, see Johannes Chan, "The Right to Speedy Trial," (1993) 2 *Asia Pacific Law Review* 12-25.

11. See note 2, at pp. 70-71.

12. *R. v. Lee Kwong-kut* and *R. v. Lo Chak-man*, see note 3.

13. [1992] 1 H.K.C.L.R. 127.

14. See note 4.

15. (1988), 42 C.C.C. (3d) 97.

16. (1990), 62 C.C.C. (3d) 193.

17. Lawton L.J. said in *R. v. Edwards* [1975] Q.B. 27, at pp. 39-40:

> ... this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleadings. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisoes, exemptions and the like, then the prosecution can rely upon the exception.

This passage was approved by the Privy Council in *R. v. Lee Kwong-kut* (1993), 3 H.K.P.L.R. 76, at p. 85. The Privy Council then adopted the comments of Lord Griffiths in *R. v. Hunt* [1987] 1 A.C. 352, at p. 375, that "the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which do not fall within this formulation are likely to be exceedingly rare."

18. See note 6 and the accompanying text.

19. See Andrew Byrnes, "The Impact of the Hong Kong Bill of Rights on Litigation," in *Law Lectures for Practitioners*, ed. Judith Sihombing (Hong Kong: Hong Kong Law Journal, 1992), pp. 152-235.

20. See quote above, p. 21.

21. *Tam Hing Yee v. Wu Tai Wai* [1992] 1 H.K.L.R. 185.

22. The decision is *Tam Hing Yee v. Wu Tai Wai* (1991), 1 H.K.P.L.R. 1 (D.Ct.); [1992] 1 H.K.L.R. 185 (C.A.), which is discussed in the last section of Professor Jayawickrama's paper and described by him as "an aberration."

23. In April 1993 the Government published a consultation document on the reform of the law relating to information privacy, which proposed, *inter alia*, the enactment of data protection legislation. The proposals are confined to the protection of personal information and do not cover many other aspects of privacy. See Law Reform Commission, *Reform of the Law Relating to Information Privacy: A Consultative Document* (Hong Kong: Government Printer, 1993).

24. Professor Peter Wesley-Smith made this observation in a seminar on Access to Information and Freedom of Expression held in March 1993 and organized by the Faculty of Law, University of Hong Kong.

25. Basic Law, Article 23.

26. *Re RJR-MacDonald Inc. v. Attorney-General of Canada* (1991), 82 D.L.R. (4th) 449.

27. The trial decision was reversed on appeal: (1993), 102 D.L.R. (4th) 289 (Que. C.A., Brossard J.A. dissenting in part). Application for leave to appeal to the Supreme Court of Canada was granted on 14 October 1993. A further application for a stay of the Quebec Court of Appeal judgment was dismissed on 3 March 1994. At the time of publication, oral argument before the Supreme Court of Canada had not yet been heard.

Bills of Rights: Canada Leads, Hong Kong Follows?

Richard Cullen

Conspectus

This paper looks broadly, in the beginning, at the respective circumstances of the introduction of the Canadian Charter of Rights and Freedoms (1982) (the Charter)[1] and the Hong Kong Bill of Rights (1991) (the Bill of Rights).[2] In the section "Broad Repercussions for the Legal Cultures," I consider briefly the legal impact of each instrument on the respective legal cultures. The next section on "Kindred Expeditions" is a comparative study of the most alike jurisprudence to appear thus far under each instrument. In Hong Kong, even more so than in Canada, there has been, to date, a close to exclusive focus on criminal law and procedure cases in major Bill of Rights litigation.

I can foreshadow my conclusion by declaring now that the answer to the query in the title of this paper is: so far, only to a limited extent. Let me add, though, that this relates significantly to the confined range of issues litigated under the Bill of Rights. In those areas which *have* been litigated, Canadian Charter case law has been of great importance.

I also should point out that the emphasis throughout this paper is on the Hong Kong experience. The Charter issues discussed have been raised to illuminate the Hong Kong developments rather than for discussion in their own right. The relevant discussion of the Charter of Rights comes first in each section to set the scene for the Hong Kong discussion. As I write, the Charter is now over ten years old and the Bill of Rights has passed its second anniversary.

From Whence They Came

Canada

Canada has had a statutory Bill of Rights since 1960.[3] The statutory nature of that instrument, its scope and the time of its introduction, combined with marked judicial restraint in its interpretation by the Supreme Court of Canada, limited its impact fairly dramatically.[4] The Charter, as I explain in part 3, has been quite a different creature (some would say, monster[5]).

Professor Mandel argues that one particular major turning point in Canada's political history gave great impetus to the project to introduce the Charter (as it became). In the Quebec Provincial election of 1976,

the avowedly separatist Parti Québecois (PQ) came to power.[6] Their victory was surprising and, indeed, alarming, especially to Canadian federalists like Pierre Trudeau, Canada's prime minister at that time. The federal government's response to the growing stridency of the PQ government's assertion of Quebec's interests included the introduction of Bill C-60, the centrepiece of which was a constitutional Charter of Rights. This was an exercise in "unity-building" from Ottawa. It was an attempt to defuse the growth of separatist sentiment in Quebec by using constitutional devices to stress the aggregate wholeness of Canada. It was initially to apply only to the federal government and provincial governments at their option. It also contemplated full constitutional entrenchment.

The second world oil crisis in 1979 led to defeat for the Trudeau Liberal federal government. The PQ government in Quebec seized the opportunity to launch a referendum to test support for a form of separation or "sovereignty-association." The Joe Clark Progressive Conservative (PC) minority federal government fell within twelve months, also, indirectly as a result of the second world oil crisis. Trudeau returned to power in February 1980 before the Quebec referendum was held. The 1980 referendum campaign in Quebec was bitter. In the end, a comfortable majority rejected the moves toward separation.

During the referendum campaign, Trudeau had promised a renewed Canadian constitution to bring Canada together. The two crucial components of this plan were to be a strong federal government and a Charter with language rights designed to appeal to francophones in Quebec especially.[7]

The two years following the Trudeau victory were acrimonious, indeed, in political terms. Intergovernmental relations, especially between Quebec and Ottawa, slipped lower and lower as Trudeau made it clear that the federal government was going to act unilaterally, if necessary, to bring about major constitutional change. By the time of its introduction, all the other nine provinces had agreed, after much heated argument in judicial[8] and mainstream political forums, to the Trudeau-conceptualized constitutional package, which included the Charter of Rights and Freedoms. Quebec alone, in the end, refused to participate.

Less than twelve months before it come into force, the Charter enjoyed widespread support in the opinion polls.[9] By this stage, it had become the focus of popular attention and sanction. It had taken on, in the public imagination, the status of a "turning point" constitutional

instrument. That popular perception of its fundamental importance is entirely accurate.[10]

It came into force by royal proclamation on 17 April 1982. Outside of Quebec, it did so, generally, to popular acclaim. Minority, forcefully argued criticism also greeted its introduction, however. This criticism has continued.[11]

Hong Kong

From the end of the second World War and especially after the Korean War, everything seemed to go fairly smoothly for Hong Kong until the late 1970s through early 1980s.[12] Yet, Hong Kong is now somewhat anxiously adapting to cope with absorption into the People's Republic of China (PRC) in 1997. Uncertainty, opportunity, oscillating optimism and pessimism, enthusiasm for at last throwing off colonialism, and apprehension about returning to China – all these premonitions and many more wash almost daily backwards and forwards across Hong Kong. How did we come to this turning point?

There appear to be three main interlocking reasons. Firstly, the British land tenure of the New Territories is based on the ninety-nine year lease embodied in the Second Convention of Peking. This lease expires in 1997. Secondly, especially since the last war, the New Territories have been vastly redeveloped to decrease the burden on the traditional population foci of Hong Kong Island and the Kowloon Peninsula and also to help cope with the major influx of immigrants from the PRC, especially through the 1960s and 1970s. The territory of Hong Kong currently has a population of around 6 million. About 2.5 million of these people now reside in the New Territories,[13] predominantly in the vast, spectacularly vertical, new towns like Shatin, Yuen Long, Tuen Mun, Tsuen Wan, Sheung Shui, and Tai Po.

The entire *private* landholding system of Hong Kong is leasehold, apart from the land occupied by the Anglican Cathedral. In the case of Hong Kong Island and the Kowloon Peninsula, this system is underpinned by the ceding of those lands in perpetuity under the respective treaties (putting aside the non-recognition of those "unequal" treaties by the PRC). The difficulty with the New Territories is that the private landholding system is, itself, only underpinned by the 1898 lease for ninety-nine years.

This fact has given rise to the third pressure for change. By the early 1980s, investors were beginning to grow uneasy about their long-term

tenure in the New Territories. This in turn ripened the British government's desire to find a way to reassure both existing and new landholders about the prospects for investment in the New Territories beyond 1997. The then governor, Sir Murray MacLehose, raised the issue in discussions with the Chinese leader, Deng Xiaoping, in 1979. He received a vague reassurance that investors in Hong Kong should "put their hearts at ease."

By 1982 the British decided they had to force a clarification of Hong Kong's future with China. The British aim was, somehow, to secure agreement that Britain could maintain some sort of administrative management of the territory *after* 1997 and to give the *unofficial* accord between Britain and the PRC over Hong Kong some formal shape after thirty years of informal success.[14] Given the historical attitude of the PRC government towards all the treaties creating Hong Kong, the hopes of success were fairly faint. How could Beijing formally agree to a continuation of a "colonial" arrangement in the face of the PRC's own continuous refusal to recognize the instruments giving rise to Hong Kong's Britishness?

True, the benefits the PRC had enjoyed from Hong Kong's separate status were immense, not lightly to be thrown away.[15] PRC leaders, however, were ready with a solution of their own which required no British administration. In April 1982, Deng gave a comprehensive outline of Beijing's plans for the future of Hong Kong. It would return to the PRC and be subject to Chinese sovereignty, but as the Hong Kong Special Administrative Region (HKSAR), enjoying much local autonomy. Indeed, it would still be governed by Hong Kong people, retain its common law legal system, and remain a fully capitalist enclave. Moreover, this politico-economic status for the new HKSAR would be guaranteed for fifty years beyond 1997.[16]

Negotiations continued. The British continued to argue the necessity of retaining a British administrative presence to guarantee success beyond 1997.[17] PRC leaders stood their ground and ultimately prevailed as they had to, given the relative bargaining positions. The outcome of the negotiations was the *Joint Declaration of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong* (the Joint Declaration), which was concluded in September 1984. The Joint Declaration embodied Beijing's principles for Hong Kong's governance outlined above. It was ratified by the two governments by May 1985.

The Joint Declaration is a long and complex document with three annexes. The most important constitutional composing task it presaged was the drafting of a Basic Law, or new Constitution, for the HKSAR. The PRC government appointed a Basic Law Drafting Committee in July 1985. It drew its membership of fifty-nine from Hong Kong (twenty-three) and the PRC (thirty-six).

The Basic Law was to capture, formalize, and provide the documentary means for welding in place the fundamental political decisions about Hong Kong's future. Pre-eminently, this included the decision to preserve Hong Kong's way of life, especially its economic way of life (subject to the fundamental change of "landlord"). After going through two drafts (1988 and 1989), the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* was adopted by the National People's Congress of the People's Republic of China in April 1990. Constitutionally, this has placed Hong Kong (not for the first or probably last time) in quite a remarkable position. Its new constitution will lie on the table, in completed form, for over seven years before it becomes operative. Few, if any other constitutions, have been "warehoused" in this way. This timetable is intended to assist with an orderly transition after 1997. An overriding concern of almost everyone involved in the transitional process has been to keep Hong Kong's prosperity humming.[18]

There is no space here to go into detail about the Basic Law.[19] Before leaving this topic, however, several points about it should be stressed. First, the essence of the Basic Law is to grant autonomy to guarantee *continuity*, not autonomy to foster *independence* or *wide choice*. That is, the PRC appears to consider that the key to the continuation of Hong Kong's prosperity is to lock its presently developed form of (largely) Chinese capitalism in place. The Basic Law is, thus, not a charter for experimentation in the HKSAR.[20] Second, the political reality is that the PRC clearly could find ways to circumvent the spirit of the Basic Law if it so felt the need. Indeed, the Basic Law itself provides for intervention from Beijing if disruptions to internal security threaten national unity or are beyond the control of the HKSAR government. Finally, the last word on amendment of the Basic Law rests with China. There is no Hong Kong controlled change-mechanism equivalent to Part V of the Constitution Act (1982) in Canada. There is an argument that the key elements promising autonomy for the HKSAR may be beyond easy amendment, however.[21]

Generally, the negotiations for 1997 have gone smoothly with one profound disruption, 4 June 1989, when the tanks and troops of the PRC army crushed the pro-democracy movement in Tiananmen Square. On that day, the entire transition process plunged into uncertainty.

One of the important components in the transition process is the Sino-British Joint Liaison Group (JLG). This was established with five members each from the United Kingdom and the PRC. Its task is to ensure the effective implementation of the Joint Declaration. After the June 4 Massacre, a million people took to the streets of Hong Kong protesting against the PRC government's action. All meetings of the JLG were cancelled by the British for several months.

Beijing demanded that the Hong Kong government take measures to reduce the level of anti-PRC protest in Hong Kong. The British refused this request. Rather, they articulated a series of measures designed to restore and boost confidence in Hong Kong. The measures included the granting of full British passports to 50,000 families of Hong Kong residents, the building of a huge new international airport, pressing China to allow for greater democratization of government prior to 1997, and the introduction of a Bill of Rights for Hong Kong.

Some limited but still controversial progress has been made on increased democratization. In October 1992 the Governor of Hong Kong, Chris Patten, announced a package of democratic reform proposals. These were harshly criticized by the PRC. Legislative implementation of these limited steps has commenced. The likelihood of their survival beyond 1997 is most uncertain. The passport measure has been implemented, and work on the new airport commenced with Beijing's highly qualified approval. The airport project is enmeshed, however, in formidable controversy over its cost, practicability, viability, and political acceptability.[22]

The Hong Kong Bill of Rights came into effect on 8 June 1991. With some small (at times significant) variations, it bases itself squarely on the International Covenant on Civil and Political Rights (ICCPR).[23] It almost certainly has been entrenched until 1997 as superior to all other Hong Kong law.[24] The reality of the Bill of Rights in Hong Kong is now widely recognized amongst the general population, and it appears generally to enjoy popular support. This support is qualified by typically hard-headed recognition of the overarching power of the PRC with respect to Hong Kong, especially after 1997.[25]

Broad Repercussions for the Legal Cultures

Canada

There is insufficient space here to consider this topic in detail. The consequences for Canada of the introduction of the Charter have been very significant and, indeed, controversial. There is an ongoing, intense debate which shows few signs of lessening.

It has been argued that in one sense, at least, the Charter is a centralizing influence in a Canada which has shown many signs of separating over the last decade.[26] Arguments against the Charter date to well before its inception[27] and continue to amass.[28]

In light of the resounding "No" vote in the October 1992 national referendum on the Charlottetown Agreement, a strong case can now be made that the Charter has proved more divisive than unifying or centralizing. Although it is true the Charter has worked to "standardize" public policy practices across the Canadian Provinces, it also has been a major factor in highlighting if not encouraging new divisions. These days, the principal strategy of many special interest groups is to head for the courts or, at least, articulate their positions using Charter-style arguments. This phenomenon was clearly evident in the referendum campaign.

What is beyond question is that the Charter has intruded into many aspects of Canadian existence. It has extended well beyond influencing criminal law and procedure. Thus, the Charter has, often controversially and crucially, influenced industrial relations,[29] commercial regulation,[30] language related matters (always politically pivotal in Canada),[31] abortion rights,[32] and equality rights.[33]

The Charter is influencing and shaping institutional structures across Canada. It has given rise to an immense increase in constitutional-style litigation. Indeed, it has been described as a "dripping roast for lawyers." It is fair to say that, constitutionally, the earth has moved for Canada since its introduction. Its influence likely is consolidating in some areas but shows few signs of diminishing.

Hong Kong

The Bill of Rights in Hong Kong has been in operation just over three years, about one tenth of the Charter's life-span. This fact clearly makes comparisons difficult. It is possible to see some trends, however, and also to contemplate the likely future effects of the Bill of Rights based upon some of the fundamental realities of politico-economic life in Hong Kong.

The first point that can be made relates to access to the Bill of Rights. Hong Kong is a very expensive place in which to litigate. Moreover, partly because of the cost but also because of indigenous culture, litigation is not such a popular option as in the North American common law world.

Additionally, although the Government of Hong Kong defied the PRC in introducing the Bill of Rights, it appears to have adopted a policy of providing only limited support for its application, very likely partly in response to PRC pressures.[34] In particular, the Hong Kong Government has resisted repeated calls for the establishment of a Human Rights Commission, and only very limited public funding for Bill of Rights cases was available initially, although this has been increased somewhat. Furthermore, the delay in the reporting of decisions and the general lack of availability of rights-related research materials in Hong Kong has been roundly criticized.[35] In the first year of the Bill of Rights, several critical Ordinances were also exempted from its effects.[36] The negative factors likely will persist, at least to a significant degree, and will continue to have a dampening effect on the impact of the Bill of Rights in Hong Kong.

The Bill of Rights also does not carry any "nation-building" or "unifying" burden comparable to that borne by the Charter. It is operating in an entirely different and undemocratic political culture, which makes the existence of an enforceable Bill of Rights in the midst of Hong Kong's benign quasi-autocracy remarkable in itself. However, it is also a culture in which there are no Canadian-style problems of tribal and regional cleavages or indigenous peoples yearning for (delayed) justice.

The lack of resources problem is not the obstacle for commercially driven litigation using the Bill of Rights that it is for the average citizen or welfare group, of course. Yet, there has been little impact felt from the Bill of Rights on Hong Kong's political-economy, in marked contrast to Canada. In the one major civil law Bill of Rights case decided by the Court of Appeal, the court reversed the decision at first instance. In *Tam Hing Yee v. Wu Tai Wai* (1991),[37] Judge Downey held that Section 52E(1)(a) of the District Court Ordinance (1953)[38] violated the liberty of movement guaranteed by Article 8 of the Bill of Rights. The section allowed a judgment creditor to take action to prohibit the judgment debtor from leaving Hong Kong. The Court of Appeal held[39] that the Bill of Rights binds only the Hong Kong government and

public authorities; and, therefore, the guarantees in the Bill of Rights could not be invoked in litigation between two private parties to impugn legislation affecting the rights of those parties *inter se*.

Another point of some importance is that it is not clear yet whether corporate legal persons are protected under the Bill of Rights. In Canada and New Zealand, for example, it is quite clear that they are. The ICCPR was intended to apply only to individuals. However, it is arguable that the Interpretation and General Clauses Ordinance (1966)[40] may extend the application of the Bill of Rights to corporations. Moreover, even if it does not so apply, actions may be able to be brought by individual shareholders in certain cases.[41]

Apart from judicial reluctance to open up the Bill of Rights to inter-party civil litigation, a more important factor in the limited likelihood of the Bill of Rights ever emulating the Charter in reworking the relationship between capital, labour, and government is the attitude of business interests to the Bill of Rights. In the first place, commerce is, by almost any comparison within the OECD countries, lightly regulated and taxed. Secondly, the Hong Kong business elite has worked over many years in a smooth and mutually beneficial relationship with the Hong Kong government. When problems of a regulatory nature do emerge, there are already formal and informal mechanisms in place to deal with them – mechanisms which are far more swift and cost effective than litigation.

Given the profound desire on the part of virtually all components in Hong Kong society to maintain stability and prosperity,[42] it is not surprising that business is not comfortable with the idea of challenging governmental authority.[43] In my view, this disposition on the part of business – coupled with the relative inefficiency and expense of Bill of Rights litigation compared to alternative mechanisms, plus doubts over the corporate right to litigate under the Bill of Rights, and the lack of need to litigate, given the minimalist Hong Kong regulatory climate – suggests it is unlikely that the significant politico-economic impact of the Charter will be mimicked in Hong Kong. One commentator has recently agreed that the unlikelihood of Bill of Rights challenges has led the Hong Kong Government to continue to rely on laws which likely are inconsistent with the Bill of Rights. The Government apparently feels that very few vulnerable provisions will be challenged in the courts.[44]

Kindred Expeditions

Introduction

As I noted at the beginning, it is in the area of criminal law and procedure that the greatest amount of litigation has occurred. Some of the principal reasons why litigation has been so limited in other areas have been explained in the third section, Broad Repercussions.

In particular, there has been a major focus on questions relating to the presumption of innocence guarantee embodied in Article 11(1) of the Bill of Rights and the issue of undue delay covered by Article 5 and Article 11(2)(c) of the Bill of Rights. The equivalent provisions of the Charter of Rights are Sections 11(d) and 11(b), respectively.

Hong Kong has something like 500 local Ordinances. Included amongst them are a remarkable variety of criminalizing enactments, many of which are designed to deal with the ongoing problems in the territory of bribery and corruption. In some other jurisdictions, civil liberties concerns would militate strongly against such a powerful statutory crime-fighting armoury. Within Hong Kong, there is widespread tolerance, if not outright support, for such measures.[45] It is estimated that there are almost 300 reverse onus provisions in various Hong Kong Ordinances.[46]

Delays in the criminal justice system in Hong Kong are quite notorious. They appear to be growing worse. The pressure on the system arising from the active investigation and prosecuting of offences under the variety of Ordinances mentioned above has been one factor. The Bill of Rights itself is adding still further pressure. Underlying all this are the systemic problems in the criminal justice system. These range from inefficiencies in the Crown prosecuting system to ponderous court room functioning. Generally, case-flow management is barely worthy of the name in Hong Kong. The most common solution suggested is: appoint more judges. This solution is suggested in most jurisdictions facing similar problems, although the research continues to show that a shortage of judges is rarely of more than marginal importance.[47]

The Presumption of Innocence

Canada

It has been argued that the Supreme Court of Canada (SCC), in applying Section 11(d) of the Charter, has used a more stringent test than the one it employed under the Canadian Bill of Rights[48] and the one

deployed under the European Convention on Human Rights.[49] This seems to be correct.

There is a partial textual explanation for this. Under the Canadian Charter, the courts have to consider the *prima facie* position under Section 11(d) and then move on to consider whether a *prima facie* breach of that section may still be justifiable because of the operation of Section 1 of the Charter. Section 11(d)'s guarantee that "any person charged with an offence has the right [*inter alia*] to be presumed innocent until proven guilty according to law" is a right which Section 1 says can be attenuated by "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This has led the SCC to set up a two stage process. The party alleging a violation of Section 11(d) needs to establish that a violation has occurred, on the balance of probabilities. If that test is satisfied, then the Crown carries the burden of arguing the Section 1 justification, again, on the balance of probabilities.

This more stringent approach is not a product of the textual actuality alone, of course. It is now very well established that the SCC has generally taken a much more activist role in interpreting the Charter than it ever did with the still extant, though now largely redundant, statutory Bill of Rights (Canada) which dates from 1960.

The principal turning-point Charter case on Section 11(d) is *R. v. Oakes* (1986),[50] which concerned Section 8 of the Narcotic Control Act (1985) (NCA).[51] Section 8 stipulated that an accused found in possession of a narcotic would be deemed to be in possession of that narcotic for the purposes of trafficking unless he could establish the contrary. It was a clear reverse onus provision. The Supreme Court of Canada had no difficulty concluding that there was a *prima facie* Section 11(d) violation. In particular, the Court found that a provision such as Section 8 could result in a conviction *despite the existence of a reasonable doubt* about the guilt of an accused. Moreover, the court found that Section 8 of the NCA could not be justified under Section 1 of the Charter. In particular, the Supreme Court laid down a test for applying Section 1, which was a general Section 1 test, not one simply related to the Section 11(d)-Section 1 interaction. The test has two parts, but, just to keep things complex, part 2 has three components. Part 1 of the test states that the purpose or objective of given legislation must be sufficiently pressing and substantial to override a Charter right – the "objective" or "purpose" test. Part 2 of the test is the so-called, "proportionality" test. It comprises three components:

1. measures adopted by a law must be designed to achieve the objective in question; they must be rationally connected to the objective;
2. the means adopted should impair the right as little as possible; and
3. the means adopted must be proportionate to the objective sought to be achieved.[52]

The Court found in *Oakes* that, although Section 8 of the NCA passed part 1 of the test (the worthiness of the objective), it failed component 1 of the proportionality test. The small or negligible quantity of a narcotic, that Section 8 of the NCA stipulated would trigger the reverse onus provision, was not rationally connected to the objective of curbing drug trafficking.

The application of the tests spelled out in *Oakes* has since been clarified further. In 1988, in *R. v. Vaillancourt*,[53] the Supreme Court struck down Section 213(d) of the Criminal Code (1970)[54] which created a constructive murder offence. Culpable homicide could become murder where the person causing death was committing or attempting to commit a certain range of offences and used or had a weapon at the time.

In *R. v. Whyte* (1988),[55] *R. v. Chaulk* (1991)[56] and *R. v. Keegstra* (1991),[57] the Court demonstrated a shift in sympathy towards the Crown. Although the Section 11(d) analysis remains strict, the stringency of the Section 1 test has been attenuated. In all three cases, the variety of provisions considered, which imposed reverse onus type burdens on the accused, offended Section 11(d) but were saved by Section 1 of the Charter.

More recently, in *R. v. Wholesale Travel Group Inc* (1991),[58] a majority in the Supreme Court upheld the validity of Section 37.3(2) of the Competition Act (1970).[59] Section 37.3(2) created a statutory "due diligence" defence to a regulatory, misleading advertising offence. That is, the offence was regulatory rather than criminal, although breach could lead to imprisonment.[60] The aim of the section was to create a presumption of violation once certain facts related to the offending advertising had been established. The defence could rebut the presumption by proving that, on the balance of probabilities, "due diligence" had been exercised. Interestingly, two judges[61] said that the very nature of the (regulatory) offence meant that there was no *prima facie* problem with Section 11(d). It would be virtually impossible, they said, for the Crown to prove lack of due diligence. Without the presumption, the regulatory scheme simply would not work or only work with very

limited effectiveness. Three judges[62] upheld the validity of the challenged section under Section 1 of the Charter. Lamer C.J.C. (Sopinka J. concurring) was in dissent. Lamer C.J.C. found that Section 11(d) was offended. He argued that the worthy objective of Section 37.3(2) could have been met by a presumption plus requiring something *less* from the accused by way of rebuttal than establishing due diligence on the balance of probabilities.

More recently still, in *R. v. Downey* (1992),[63] the Supreme Court upheld the effectiveness of a presumptive provision aimed at curbing the activities of prostitutes' "pimps" by a 4:3 majority.[64]

Hong Kong

Given the heavy reliance on reverse onus provisions in Hong Kong Ordinances outlined above, it is not surprising that they have been heaviiy challenged under the Bill of Rights.[65] The first Court of Appeal[66] decision on the Bill of Rights concerned such a provision. In September 1991, three months after the introduction of the Bill of Rights, the Court of Appeal handed down its decision in *R. v. Sin Yau Ming* (1991).[67]

Here there was a challenge to a number of reverse onus provisions in the Dangerous Drugs Ordinance (1969).[68] Sections 46(c)(v) and 46(d)(v) provided that where a person was proved to have in his possession more than a certain quantity of a specified dangerous drug, he would be presumed to possess the drug for trafficking unless he proved the contrary. Section 47(1) went on to provide that where a person controlled premises where a specified dangerous drug was found or had keys to any such place, possession would be presumed unless the contrary was proved. Section 47(3) said that persons who had specified dangerous drugs in their possession or were in presumed possession would be *further* presumed to know the nature of the drugs unless the contrary was proved (a presumption on a presumption).

European and Canadian case law was cited and argued. In particular, the *Oakes* line of Charter cases was carefully considered by the Court (Silke V-P., Kempster and Penlington J.J.A.). The *Oakes* approach proved highly influential. All the above provisions, with the exception of Section 47(3), were unanimously held by the Court of Appeal to be repealed through the operation of Article 11(1) of the Bill of Rights. A majority (Silke V-P. and Kempster J.A.) also found that Section 47(3) violated the guarantee in Article 11(1).

The Bill of Rights has no equivalent to Section 1 of the Charter. Accordingly, some blending of the *Oakes* reasoning emerges in the Court's findings. The essential components of the full *Oakes* test are there, however. Kempster J.A. (whose formulation Silke V-P. explicitly endorsed) put it as follows:

> A mandatory presumption of fact may be compatible with article 11(1) of the Bill of Rights if it be shown by the Crown, due regard being paid to the enacted conclusion of the legislature, that the facts to be presumed rationally and realistically follow from that proved and also if the presumption is no more than proportionate to what is warranted by the nature of the evil against which society requires protection.

Thus, there is the requirement for achieving a pressing social objective, and the means employed must pass tests of proportionality and rationality.

More recently, in *A.G. v. Lee Kwong-kut* (1992),[69] the Court of Appeal (Cons V-P., Kempster J.A. and Bokhary J.) found that Section 30 of the Summary Offences Ordinance (1933)[70] was inconsistent with Article 11(1) of the Bill of Rights and, thus, was repealed. In this case, the Crown had appealed the decision of the magistrate who had similarly found this inconsistency. The defendant had been found in possession of HK$1.78 million.[71] Section 30 presumed the offence of unlawful possession, once possession was established *and* the accused was unable to explain how he came into possession of a such a large sum of money. The provision failed the test set out in *Sin Yau Ming*. The Crown has decided on a further appeal to the Judicial Committee of the Privy Council.[72]

In *R. v. Lum Wai Ming* (1992),[73] Deputy Judge Burrell upheld in the High Court several (post *Sin Yau Ming)* redrafted presumptive provisions of the Dangerous Drugs Ordinance (1969),[74] but struck down one of the new presumptive provisions (Section 47(1)(c)) for failing the rationality and proportionally tests laid down in *Sin Yau Ming*.

Perhaps more significantly, the case also decided a constitutional point. The new presumptions were drafted *after* the Bill of Rights Ordinance came into effect. The constitutional effectiveness of the device of incorporating the ICCPR in the Hong Kong Letters Patent to ensure that the Bill of Rights overrode all legislation enacted up to 1997, thus, had to be considered.[75] Deputy Judge Burrell held that Article VII(3) of the Letters Patent applied the ICCPR to all legislation during

the period 8 June 1991 to 30 June 1997. It thus applied to the newly drafted provisions which had to demonstrate compatibility with the ICCPR or face repeal. There was an immediate call for the Court of Appeal to rule on the constitutional effectiveness of the redrafted provisions.[76]

Undue Delay

Canada

Section 11(b), the Charter protection against undue delay, has been invoked more frequently than any other Charter right.[77]

A parting of the ways between Canadian and American jurisprudence on the issue of undue delay in resolving charges against an accused began to crystallize in 1987 in *R. v. Rahey*.[78] In a dissenting opinion in *R. v. Mills* (1986),[79] Lamer J. said that the American-influenced approach on undue delay taken in some provincial jurisdictions in Canada was, in part, not applicable in Canada since the introduction of the Section 11(b) Charter guarantee, which states that, "Any person charged with an offence has the right....to be tried within a reasonable time."

In 1972, in *Barker v. Wingo*[80] the Supreme Court of the United States had listed four factors reflecting the interests of both defence and prosecution, which had to be weighed when deciding if delay in the application of the criminal justice system warranted a constitutional (Bill of Rights, USA) remedy for an accused. Lamer J. agreed that a balancing of several elements had to take place, but he rejected the fourth factor – prejudice to the defendant (in the sense of the accused having to show impairment of access to a fair trial) stipulated in *Barker v. Wingo* as having a place in the Section 11(b) calculus. Essentially, Lamer J. said that Section 11(b) required that the *prima facie* impairment to the interests of the accused caused by any delay needed to be weighed against three exculpatory, prosecution-focused factors:

1. any waiver by the accused;
2. the complexities of the case; and
3. difficulties arising from limited resources.

In *Rahey's* case, Lamer J. was no longer in dissent. The Supreme Court of Canada decided in that case that the Charter guarantee against undue delay did require a different approach to that taken in *Barker v. Wingo*. Lamer J. repeated the view he had expressed in *Mills*. His entire rejection of the "prejudice to the defendant" factor for

Section 11(b) purposes was *not* endorsed by the Court, however. Lamer's argument was that this factor was relevant to deciding under Section 11(d) whether the guarantee of a right to a fair trial had been violated but was not relevant in the application of Section 11(b). In *CIP Inc. v. The Queen* (1992),[81] however, Lamer C.J.C. accepted the majority view that preventing prejudice to the fairness of an accused's trial is one of the purposes of Section 11(b).

In effect, the majority of the Court added a further factor, (modified) prejudice to the defendant or accused, to the factors set down by Lamer J. in *Mills*. La Forest J. captured the difference as follows. It was not appropriate to adopt the *Barker v. Wingo* tests in unqualified form. The Supreme Court of the United States was strongly influenced in its formulation of those tests by its perception of the limited, drastic remedy it was able to apply – dismissal of the charge(s). Somewhat haunted by the spectre of having to turn loose serious criminals, the U.S. Court had laid a stringent burden on the accused – the need to establish real prejudice in order to invoke the constitutional guarantee.

In Canada, however, the Supreme Court did not have to order a stay of proceedings. It could apply *other* remedies, such as ordering the expediting of the trial in La Forest's view. Under Section 24 of the Charter, courts of competent jurisdiction may apply such remedies as the court considers just and appropriate in the circumstances. At the end of the day, prejudice to the accused *was* a relevant factor, but it was not an essential factor before the Section 11(b) guarantee could be invoked.

There is doubt about the Supreme Court's power or will to apply a range of remedies under Section 24 where Section 11(b) is invoked.[82] Nevertheless, it seems clear that, although prejudice to the accused is a *relevant* factor to be considered when deciding if Section 11(b) has been violated, it is not *essential* for an accused to demonstrate such prejudice.[83] The significance of this distinction is that the burden on an accused of demonstrating actual prejudice (particularly if it is in the specific sense of prejudice to her or his right to a fair trial) is a difficult one to satisfy. Making such a demonstration crucial to the invocation of Section 11(b) would put it out of reach for many accused persons.

The question remains, though, just what does an accused need to do to demonstrate prejudice in order to invoke Section 11(b)? In *R. v. Smith* (1989),[84] Sopinka J., writing for the entire Court, concluded that

while there are points of disagreement within the Court, the following elements of the Section 11(b) test are agreed on:

1. the length of the delay;
2. the reasons for the delay, including any limits on institutional resources and the inherent time requirements of the case;
3. the waiver of any time periods; and
4. prejudice to the accused.

He went on to say that, although the accused generally carries the burden of establishing any violation of Section 11(b), a long period of Crown-induced delay would ordinarily call for an explanation from the Crown.

In *R. v. Askov* (1990),[85] Cory J., writing for the majority of the Supreme Court of Canada, restated the requirement that prejudice to the accused was a relevant factor to be considered; but where a very long and unreasonable delay had occurred, this prejudice could be *inferred.* In such cases, however, it would still be open to the Crown to argue that the accused's trial should, nevertheless, proceed by demonstrating that no resulting damage would be suffered by the accused. Where delay was extreme, though, the presumption of prejudice would become irrefutable.

Three recent cases, *R. v. Morin* (1992)[86], *CIP Inc. v. The Queen* (1992),[87] and *Sharma v. The Queen* (1992),[88] have sharpened the definition of the tests to be applied under Section 11(b). Once *prima facie* excessive delay is established, the Court needs to consider the factors outlined in *Smith's* case. Delay caused by inherent (complexity) factors needs to be considered separately from delay caused by systemic or institutional (resource) factors. In the latter case, the guideline for acceptable delay is eight to ten months; however, this is not a firm formula. Deviations from it may be allowed in either direction by reason of the presence or absence of prejudice to the accused. Thus, although prejudice will be inferred from the mere passage of time, it is still open to an accused to demonstrate prejudice. Indeed, relying on inferred prejudice alone may significantly weaken a case for invoking Section 11(b).[89] In *CIP Inc. v. The Queen* (1992), the Supreme Court also decided that a corporation could invoke the protection offered by Section 11(b).

The Supreme Court of Canada now has explicitly imported into the Section 11(b) analysis a requirement to consider societal interests or community rights when deciding Section 11(b) cases. Where the consti-

tutional validity of a *law* is in question, this takes place when a court considers the application of Section 1 of the Charter (see discussion under The Presumption of Innocence, Canada, pp. 44-45). Where the constitutional validity of government *action*, rather than a law, is in question, Section 1 of the Charter will not apply. However, over a series of cases, the Supreme Court has made it clear that an accused's interest in achieving a speedy trial must be balanced against society's interest in seeing that persons charged with offences are brought to trial.[90]

Finally, it should be noted that the Supreme Court's handling of empirical data from social science research is proving problematic.[91] Social science-based argument has been used in a number of the cases discussed above. This often has been presented to the Court in undigested (indeed, perhaps indigestible) form. The problems have been exacerbated by selective and inappropriate use of the data by the Court.[92]

Hong Kong

Article 5(3) of the Bill of Rights says, in part, that, "Anyone arrested or detained on a criminal charge...shall be entitled to trial within a reasonable time or to release." Article 11(2)(c) provides that, "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality....to be tried without undue delay."

As was noted above, institutional factors have combined in Hong Kong to exacerbate problems with criminal procedure delays. In *In the Matter of South Kowloon Magistracy Court Criminal Case No. K-4535 of 1991*,[93] Sears J. in the High Court put it this way:

> The position in Hong Kong for criminal trials in the High Court should now be a matter of public anxiety. Delays of up to fifteen months from committal to trial are common. This may mean a person being kept in custody for eighteen months or so from arrest or even longer.[94]

In this case, the defendant had been arrested and charged in May 1991 and refused bail in June 1991. The defendant applied for bail again in July 1991. It appeared at that stage that although the committal hearing would occur in August 1991, the trial itself would not come on until September 1992, apparently due to the insufficient number of High Court judges.[95] Sears J., who heard the second bail application in the High Court, agreed to hear argument based on the Bill of Rights. He found that Article 5(3) embodied a presumption of bail. When he took

into account the prospective delay facing the accused in being brought to trial, he considered that the accused would not be brought to trial within a reasonable time. *Prima facie*, bail ought to be granted. However, if the Crown were able to produce cogent evidence that bail ought still to be refused, then he had a discretion so to refuse. He ultimately refused to grant bail to the defendant.[96]

There has been a significant number of cases over the past few years in both the High Court and the District Court where undue delay has been an issue.[97] So far, in few cases have permanent stays been ordered. In *R. v. Wong Chiu Yuen*,[98] Caird J. ordered a permanent stay of prosecution where, on theft and other charges, there had been a period of two years and five months pre-trial delay. In *R. v. Charles Cheung Wai-bun*,[99] Duffy J. in the High Court ordered a permanent stay of proceedings on the grounds of undue delay under Articles 10[100] and 11(2)(c) of the Bill of Rights and because of oppression and unfairness at common law. In this case, the defendant had been arrested and charged in August-September 1988 with offences which allegedly took place between 1979 and 1982. Due essentially to decisions of the Crown, the defendant's trial had been repeatedly delayed until May of 1992. Duffy J. stressed that judicial intervention to stay proceedings should only occur in exceptional cases.

The courts in Hong Kong are still in the early stages of working their way through the problem of undue delay under the Bill of Rights. It is clear that there are many issues still to be addressed. We are still awaiting some definitive case law at the Court of Appeal level. The debate about how this issue ought be tackled is well under way, however.[101] The problem is widely recognized as pressing. Indeed, the endemic delays in the criminal justice system in Hong Kong are now notorious.

Presently, the courts seem reluctant to find violations of Section 11(2)(c), principally because they appear to view a stay of proceedings (a drastic measure) as the sole remedy that can be applied.[102]

Summary

The Presumption of Innocence

The nexus between Canadian Charter case law and Hong Kong Bill of Rights argumentation is nowhere closer nor more clear than with respect to the presumption of innocence. The *Oakes* orthodoxy, regarding the interaction of Section 11(d) and Section 1 of the Charter, is almost seamlessly woven into the leading Hong Kong Bill of Rights

case, *R. v. Sin Yau Ming* (1991). As the Bill of Rights has no equivalent to Section 1 of the Charter, the Court of Appeal in Hong Kong has had to blend the two-stage Canadian test into a more continuous process. All the essential elements are there, however. There is the need for a pressing social objective to justify the override of the Article 11(1) guarantee in the Bill of Rights. Moreover, any overriding presumption must pass *Oakes*-type tests of rationality and proportionality.

The post-*Oakes* case law on Section 11(d) of the Charter shows a tendency to add qualifications to the guarantee. The radical protection of the right to be presumed innocent can be compromised in a number of circumstances, according to the Supreme Court of Canada. These include cases involving regulatory offences. Usually, the qualification is allowed under Section 1. That is, a *prima facie* violation of Section 11(d) has been found, but the provision has been allowed to stand as justified under Section 1. In the case of regulatory offences, some judges have found in the Crown's favour by concluding that *prima facie* Section 11(d) protection does not extend to certain regulatory offence presumptions.

It is rather early to tell how the courts in Hong Kong will deal with the many further arguments based on Article 11(1) they are going to encounter. It is clear that there is a widespread concern in Hong Kong that the previously fairly successful, rather extraordinary measures for combatting corruption and crime should not suffer deterioration in their effectiveness due to the influence of the Bill of Rights. These measures have generally experienced much support in Hong Kong. At the same time, Hong Kong people are generally well aware of the Bill of Rights and quite positive about it.[103]

The courts are also aware of these sentiments. The press seems to monitor each Bill of Rights case for any signs that it might be turning into a "criminal's charter." Very recently, alarm was being expressed that the Bill of Rights had set back the fight against (drug, especially) money laundering in Hong Kong after the High Court had said certain provisions in the Drug Trafficking (Recovery of Proceeds) Ordinance (1989)[104] conflicted with the Bill of Rights.[105] In this climate, we might expect the Hong Kong courts to tread with care. In my view, it is likely, over coming cases, that the courts, including the Court of Appeal, may tend to follow the relatively cautious path hewn by the Supreme Court of Canada in dealing with presumptive provisions – perhaps more so.[106] Certainly, so far, Hong Kong law enforcement agencies do not seem to be *overly* alarmed at developments with the Bill of Rights.[107]

Arguments in favour of a narrow construction of the Section 11(d) presumption of innocence guarantee, coupled with arguments for a much fairer criminal justice system, have also been made in Canada.[108]

Undue Delay

It is possible, indeed likely, that problems of undue delay are, on a per capita basis, more acute in Hong Kong than they are in Canada. The Hong Kong criminal justice system is beset with significant institutional complications which make improving case flow management difficult. These problems cover the entire process from prosecutorial procedures and resources through to the courts. Articles 5(3) and 11(2)(c) of the Bill of Rights are both exacerbating the problems and compelling attention to them. The pressures being applied to the system by Bill of Rights arguments are slowing it still further. However, the Bill of Rights provisions are throwing search lights onto the reality of the inordinate delays embedded in the process of Hong Kong criminal justice.

In this area too, the Canadian Charter jurisprudence is important. It is early, yet, in the interpretation of Articles 5(3) and 11(2)(c) of the Bill of Rights. The fact that the Canadian case law is hardly comfortably settled, however, means that such guidance as it can provide is somewhat confused.[109]

Thus far, the courts in Hong Kong seem caught in the dilemma which has afflicted other jurisdictions such as Canada and the United States. What remedies can a court apply in cases of undue delay? If the only or even principal remedy has to be a stay of proceedings, what follows from that? The answer seems to be that such a remedy can only be used in exceptional cases. This means that the burden faced by an accused in invoking any guarantee to a trial without undue delay can be very difficult to satisfy. Certainly, the American approach shows this.[110]

The Supreme Court of Canada is equivocal on the scope for using remedies other than a stay of proceedings. The European Commission on Human Rights, in its application of those provisions of the European Convention on Human Rights prohibiting undue delay, has been more flexible, however.[111]

One approach for Hong Kong which has been strongly argued is that the courts continue the common law practice of ordering a stay of proceedings only in exceptional circumstances but that other remedies be applied in lesser cases. Remedies such as monetary compensation,

an order to expedite trial, reduced sentence, or granting of bail might all be appropriate in given circumstances.[112]

If the courts adopted a more flexible approach on the question of remedies, this could allow them to set a less strict standard of demonstration of actual prejudice to an accused. Presently in Hong Kong, it is the common law, oppression and unfairness standard which dominates discussion. This appears to require the demonstration of specific prejudice to the accused, such that his or her right to a fair trial is impaired. It is a rule driven by the severity of the common law remedy where oppression and unfairness (in the prosecutorial and trial process) to an accused can be demonstrated. The common law remedy is a stay of proceedings. The Canadian position appears to be that some prejudice of a more general nature needs to be demonstrated by an accused, but where inordinate delay itself can be shown, then a (usually) rebuttable presumption in favour of the accused will arise. However, inferred prejudice alone will carry less weight than when combined with demonstrated prejudice to an accused. Within the context of the Bill of Rights (and given the wide remedies provision in Article 6), this seems the direction in which analysis of the role of prejudice to the accused in undue delay cases should head.

In Canada, the Charter guarantee against undue delay has now been held to apply to corporations. In such cases it is clear that the presumption of prejudice arising from mere passage of time does *not* apply in the case of a corporation; a corporation cannot suffer from anxiety or be imprisoned awaiting trial. If a corporation were able to invoke the Section 11(2)(c) protection in the Bill of Rights, it is clear that the same reasoning should apply.

The quite separate, though related issue, of systemic delay needs to be addressed swiftly in Hong Kong. The jurisdiction urgently needs to investigate the widest range of mechanisms to improve case flow management in the criminal justice system. Appointing more judges may be a component in addressing this problem. At very best, additional appointments are no more than a partial answer to the current disorder, however.

Finally, there is the forceful argument which Professor Hogg makes against taking too "romantic" a view of the eagerness of accused persons to get to trial. Especially where an accused is not in custody, he says, "it is only realistic to accept that a speedy trial is not desired by many accused persons and a court ordered stay of proceedings by reason of delay is a highly attractive windfall."[113]

Conclusion

Normally one would look to the installation of a representative, democratic system of government as the primary (though by no means the only) institutional protection for individual rights. A Bill of Rights built onto such a framework is seen by many as a way to increase human rights protection further. This is the Canadian model. It is not the Hong Kong model. The Hong Kong Bill of Rights is now recognized by the Hong Kong courts as a constitutional instrument, but it sits astride a limited-representative, benign-autocratic system of government.

The Bill of Rights also was prompted by an entirely different set of circumstances to those triggering the enactment of the Charter. They are a unique set of circumstances. The Bill of Rights was a symbolic reassurance at a time of maximum trauma for Hong Kong. In practice it has proved to be much more than a mere symbol, but for a variety of reasons it is reasonable to speculate, even at this early stage, that it is unlikely to colour the political and legal fabric of Hong Kong as has the Charter in Canada. It has been argued by one strong Charter critic that the peculiar context of Hong Kong's Bill of Rights, its partial surrogacy for full democratic rights, and its role in the lead up to 1997 provide a unique legitimation for its existence.[114]

In the last section, I examined the areas where the Bill of Rights has most closely shadowed the Charter experience – criminal law and procedure and, in particular, the presumption of innocence and prohibition on undue delay guarantees in each instrument. The Supreme Court of Canada has tended to move, as the case law has developed, to contain the initially suggested scope of the guarantees. In both cases, there seems to have been a concern that government needs to be allowed some freedom to infringe "raw" rights in the public interest. More particularly, some problems of regulating behaviour seem to require the allowance of certain presumptions. And given circumstances must be taken into account when looking at undue delay questions. It is not appropriate to lay down rigid formulae.

The Hong Kong courts already show some signs they are displaying the same sort of sensitivity. In a jurisdiction which has pioneered a wide range of anti-corruption and anti-crime initiatives, this is not surprising, although it is too early to determine this trend with clarity. The courts in Hong Kong also are conscious that their decisions are being closely monitored by Hong Kong's post-1997 landlord who has expressed the strongest disdain for the entire Bill of Rights enterprise.

These factors, coupled with the access to justice problems mentioned and the non-activist role of business, so far suggest the Bill of Rights will continue to have an attenuated impact on the Hong Kong body-politic *vis à vis* the Charter in Canada. It still will be an important impact.

In my view, the Bill of Rights *may* survive the transition to 1997. Indeed, if it continues to have a somewhat limited impact, this prediction is more likely to be accurate. Other factors also suggest that survival is a possibility. The international outcry if the PRC government overtly neutralized or removed it would be great and might carry serious trade consequences. Also, it has been argued that the "one country-two systems" model under which the 1997 changeover is progressing is meant to serve as a (long term) persuasive experiment for Taiwan. So again, disruption of the existing Bill of Rights regime would have a cost. Further, the PRC will be concerned not to generate unnecessary Hong Kong internal discontent and vexation. Doing away with the Bill of Rights regime, even in part, carries risks in this regard. Finally, political developments in the PRC may mean that Beijing will be taking a more sanguine view of the Bill of Rights by 1997.[115]

Notes and References

1. Canada Act 1982 (UK), 1982, c. 11, which in Schedule B contains the Constitution Act 1982, part 1 of which is the Canadian Charter of Rights and Freedoms.

2. From 8 June 1991 to 30 June 1997, this comprises the Bill of Rights Ordinance, Cap. 383, and Article VII (3) of the Hong Kong Letters Patent. From 1 July 1997, it *may* comprise the Bill of Rights Ordinance and Article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990) (the Basic Law).

3. S.C. 1960, c. 44.

4. Peter W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985), chap. 29.

5. See, for example, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989).

6. Ibid., p. 21.

7. Ibid., p. 22.

8. Quebec, Manitoba, and Newfoundland all launched constitutional challenges to the proposed constitutional package. Coincidentally, Manitoba and Newfoundland were

the principal architects of the failure of the "Meech Lake Accord," which helped trigger the current Canadian constitutional spasms.

9. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, p. 23.

10. Professor Hogg, writing fairly shortly after its proclamation, attested to its moment. See, Hogg, *Constitutional Law of Canada*, pp. 650-52. See also, Ian Greene, *The Charter of Rights* (Toronto: Lorimer, 1989), chap. 8.

11. See discussion in Richard Cullen, "Review Essay: *The Charter of Rights and the Legalization of Politics in Canada* by Michael Mandel" (1990), 17 *Melbourne University Law Review* 766.

12. Richard Cullen, "Hong Kong: Where is it Going?" (1992), 66 *Law Institute Journal* (Melbourne) 1004.

13. David Roberts, ed., *Hong Kong 1992: A Review of 1991* (Hong Kong: Government Information Services, 1992), p. 364.

14. Norman Miners, *The Government and Politics of Hong Kong*, 5th ed. (Hong Kong: Oxford University Press, 1991), pp. 6-7. This informal understanding captured the idea that Hong Kong ought to be allowed to flourish under British administration, subject to certain, largely obeyed, constraints.

15. See further, Cullen, "Hong Kong: Where is it Going?".

16. William Rich, "Hong Kong: Revolution without Change" (1990), 20 *Hong Kong Law Journal* 279.

17. Miners, *The Government and Politics of Hong Kong*, p. 9.

18. Rich, "Hong Kong: Revolution without Change," p. 279.

19. For an overview of some of its central provisions see Cullen, "Hong Kong: Where is it Going?".

20. Rich, "Hong Kong: Revolution without Change," p. 10.

21. Ibid., pp. 16-21.

22. For further discussion of the controversy over the 1992 Patten increased democracy initiative, see Richard Cullen, "Democracy in Hong Kong," (June 1994) *International Law News* 27. For further discussion of the airport battle, see David Campbell, "Fixing Prices to Shift Risk," *The New Gazette* (Hong Kong), June 1992, p. 28; Bernard Fleming, "Contracting a Greater Risk," *The New Gazette* (Hong Kong), April 1992, p. 21; and Doreen Cheung, "Airport Details Elusive in the Opening Round of Talks," *South China Morning Post*, 4 July 1992, p. 1.

23. The ICCPR was adopted by the United Nations General Assembly in 1966. The United Kingdom ratified it (with respect to the UK and its dependant territories) in 1976. Although the ICCPR is incorporated into the Basic Law (through Article 39), the PRC has not, to date, ratified the ICCPR.

24. Although the Bill of Rights (BR) itself only overrides *prior* Hong Kong law, all law introduced since the coming into force of the BR on 8 June 1991 also is effectively subject to it. This is because the ICCPR has been incorporated in the Hong Kong Letters Patent (through Article VII(3)). The Letters Patent now stipulate that all Hong Kong law making, through to 1997, must conform with the ICCPR. I say "almost certainly has been entrenched" because the entrenchment method used is novel. Thus far, this method has not been tested in the Court of Appeal in Hong Kong. The High Court has said that it is effective, however. See *R. v. Lum Wai Ming* (1992), H.Ct., Criminal Action No. 75 of 1991 (not yet reported – judgment delivered 27 July 1992).

25. Richard Cullen, "The Bill of Rights: Some New Perspectives," in *Hong Kong's Bill of Rights: The First Year*, eds. George E. Edwards and Andrew C. Byrnes (Hong Kong: Faculty of Law, University of Hong Kong, 1993), pp. 109-16. This paper was based on a survey of the impact of the Bill of Rights amongst the general public and amongst the legal sector in Hong Kong. It was the first and, at the time of writing, only such survey conducted. It was the work of the students in the Post Graduate Certificate in Laws (PCLL) program at the City Polytechnic of Hong Kong. It was run in February 1992. See also, "The Bill of Rights: Some New Perspectives," *The New Gazette* (Hong Kong), May 1992, p. 16.

26. Hogg, *Constitutional Law of Canada*, pp. 651-52. See also, Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983), 61 *Canadian Bar Review* 30.

27. Donald Smiley, "The Case against the Canadian Charter of Human Rights" (1969), 2 *Canadian Journal of Political Science* 277.

28. See comments in Greene, *The Charter of Rights*, pp. 208-22; and Mandel, *The Charter of Rights and the Legalization of Politics in Canada.*

29. See, for example, *Re Public Service Employee Relations Act, Labour Relations Act, and Police Officers Collective Bargaining Act (Alberta)* (1987), 38 D.L.R. (4th) 161; *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174; and *Lavigne v. Ontario Public Service Employees Union* [1991] 2 S.C.R. 211.

30. See, for example, *R. v. Big M Drug Mart* (1985), 18 D.L.R. (4th) 321; and *Hunter et al. v. Southam Inc.* (1984), 11 D.L.R. (4th) 641.

31. See, for example, *Reference re Language Rights under the Manitoba Act, 1870 (No. 1)* [1985] 2 S.C.R. 347; and *Ford v. Attorney-General, Quebec* [1988] 2 S.C.R. 712.

32. See *R. v. Morgentaler* [1988] 1 S.C.R. 30.

33. See, for example, *Andrews v. Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600.

34. I say partly, because it suits the interests of the Hong Kong government in a practical, operational sense to dull the impact of the Bill of Rights. See also Johannes M.M. Chan, "The Legal System," in *The Other Hong Kong Report 1992*, eds. Joseph Cheng and Paul Kwong (Hong Kong: Chinese University Press, 1992), chap. 2.

35. Gerald McCoy, "Problems in the Area of Litigation," in *Hong Kong's Bill of Rights*, pp. 49-56.

36. Immigration Ordinance (Cap. 115) (1972); Societies Ordinance (Cap. 151) (1949); Crimes Ordinance (Cap. 200) (1971); Prevention of Bribery Ordinance (Cap. 201) (1971); Independent Commission Against Corruption Ordinance (Cap. 204) (1974); and Police Force Ordinance (Cap. 232) (1948). The exemption period has expired, and these Ordinances are now subject to the Bill of Rights. Amendments to these Ordinances have been introduced though at the eleventh hour, presumably to minimize public comment and criticism about the amendments. See Chan, "The Legal System," chap. 2.

37. (1991) D.Ct., D.C. No. 6250 of 1989.

38. Cap. 336.

39. *Tam Hing Yee v. Wu Tai Wai* [1992] 1 H.K.L.R. 185; see also (1991), 1 (2) *Bill of Rights Bulletin* 8.

40. Cap 1.

41. Johannes M.M. Chan, "The Applicability of the Bill of Rights Ordinance to a Body Corporate" (1992), 22 *Hong Kong Law Journal* 269; and Andrew Byrnes, "Bill of Rights in Business" (1992), *The New Gazette* (Hong Kong) 8.

42. These aims are shared equally by the PRC government, incidentally, though opinions differ on *how* to secure these goals and *what* constitutes a threat to stability and prosperity.

43. David Shannon, "The Impact of the Bill of Rights in the Civil Area," in *Hong Kong's Bill of Rights*, pp. 57-64.

44. Andrew Byrnes, "The Impact of the Bill of Rights on Litigation," in *Law Lectures for Practitioners*, ed. Judith Sihombing (Hong Kong: Hong Kong Law Journal, 1992), p. 151.

45. Lilian Y.Y. Ma, "Corruption Offences in Hong Kong" (1991), 21 *Hong Kong Law Journal* 288, at p. 327. See also, Mark Findlay, "Institutional Responses to Corruption: Some Critical Reflections on the ICAC" (1988), 12 *Criminal Law Journal* 271, at p. 276; and Siu-Kai Lau, *Society and Politics in Hong Kong* (1981; reprint ed., Hong Kong: Chinese University Press, 1991), p. 35.

46. Chan, "The Legal System," chap. 2.

47. Carol Jones, "Court Delay," in *Hong Kong's Bill of Rights*, pp. 99-106.

48. S.C. 1960, c. 44.

49. Ma, "Corruption Offences in Hong Kong," p. 330.

50. (1986), 26 D.L.R. (4th) 200.

51. R.S.C. 1985, c. N-1.

52. Ma, "Corruption Offences in Hong Kong," p. 308.

53. (1988), 47 D.L.R. (4th) 399.

54. R.S.C. 1970, c. C-34.

55. (1988), 51 D.L.R. (4th) 481.

56. (1991), 2 W.W.R. 385.

57. (1991), 2 W.W.R. 1.

58. (1991), 84 D.L.R. (4th) 161.

59. R.S.C. 1970, c. C-23.

60. Professor Hogg defines a regulatory offence as follows: "A 'regulatory offence' (or public welfare offence) is one that punishes conduct, not because it is 'inherently wrongful' but because it has to be regulated in the public interest." Peter W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992), chap. 49, sec. 49.4.

61. Cory J. (L'Heureux-Dubé J. concurring).

62. Iacobucci J. (Gonthier and Stevenson JJ. concurring).

63. (1992), 72 C.C.C. (3d) 1.

64. Cory J., L'Heureux-Dubé, Sopinka, and Gonthier JJ. concurring; La Forest, McLachlin, and Iacobucci JJ. dissenting.

65. Chan, "The Legal System," chap. 2.

66. The Supreme Court of Hong Kong comprises the High Court and the Court of Appeal. Presently, appeals still lie to the Judicial Committee of the Privy Council in London. Three Bill of Rights cases have been heard by the Privy Council, namely, *R. v. Lee Kwong-kut* (1992), *R. v. Lo Chak-man* (1992), and *R. v. Charles Cheung Wai-bun* (1993), all of which were lodged by the Crown against decisions of the Court of Appeal.

As part of the process of readying Hong Kong for 1997, when ultimate sovereignty over the territory will pass from the United Kingdom to the People's Republic of China, a Court of Final Appeal will be established in Hong Kong and all appeals to the Privy Council will cease. The Sino-British Joint Liaison Group (JLG) responsible for overseeing the process of Hong Kong's re-integration with China said, in late 1991, that it hoped the Court of Final Appeal would be established by 1993. The JLG recommendation for its composition is controversial. See, ibid.

67. [1991] 1 H.K.C.L.R. 127.

68. Cap. 134.

69. [1992] 2 H.K.C.L.R. 76.

70. Cap. 228.

71. This is well over CDN$250,000.

72. Chan, "The Legal System," chap. 2. The appeal was dismissed by the Privy Council in March 1993.

73. (1992), H.Ct., Criminal Action No. 75 of 1991.

74. Cap. 134.

75. See discussion above, p. 39.

76. Elizabeth Ng, "Appeal for Decision on Drugs Law," *South China Morning Post*, 6 August 1992, p. 2.

77. Hogg, *Constitutional Law of Canada*, 3d ed., chap. 49, sec. 49.1.

78. [1987] 1 S.C.R. 588.

79. [1986] 1 S.C.R. 863.

80. (1972), 407 U.S. 514.

81. (1992), 71 C.C.C. (3d) 129.

82. David C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989), p. 450. Professor Hogg argues that the Supreme Court of Canada seems to have decided in *Rahey's* case and *Askov's* case that a stay of proceedings is the only possible remedy which can be applied if Section 11(b) is successfully invoked. See Hogg, *Constitutional Law of Canada*, 3d ed., chap. 49, sec. 49.10.

83. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, pp. 418 ff.

84. [1989] 1 S.C.R. 1120.

85. (1990), 59 C.C.C. (3d) 449.

86. (1992), 71 C.C.C. (3d) 1.

87. (1992), 71 C.C.C. (3d) 129.

88. (1992), 71 C.C.C. (3d) 184.

89. *R. v. Sharma*, ibid.

90. Jerome Atrens, "The Hong Kong Bill of Rights and the Canadian Charter" (Paper presented at Festival Hong Kong Workshop on "Selected Provisions of the Canadian Charter & Hong Kong Bill of Rights," Faculty of Law, University of British Columbia, 5 October 1992). See also, commentary of this issue in *R. v. Askov* (1990), 59 C.C.C. (3d) 449.

91. Carl Barr, "Criminal Court Delay and the Charter: The Use and Misuse of Social Facts in Judicial Policy Making," draft paper of 11 August 1992. See also, Carl Barr, "Lessons from the Use of Extrinsic Evidence in Institutional Delay Cases" (Paper delivered to the Fourth Annual Charter Conference, Hull, Quebec, 16 November 1992).

92. Ibid.

93. (1991), H.Ct., M.P. No. 1703 of 1991, 11 July 1991. See comment by Andrew Byrnes, "The Bill of Rights and Remand in Custody Pending Trial: A Warning Shot?" (1991), 21 *Hong Kong Law Journal* 362.

94. Ibid., p. 373.

95. See also the discussion re case-flow management above, p. 43.

96. Ibid., p. 363.

97. For example, *R. v. Wong Chiu Yuen* (1992), D.Ct., S.T.D.C. No. 44 of 1990 (District Court); *R. v. Kwan Kwok Wah* (1992), D.Ct., D.C. No. 26 of 1991 (District Court); *R. v. Lam Tak Ming*, D.C. No. 271 of 1991 (District Court); *R. v. William Hung* (1992), H.Ct., H.C. No. 32 of 1991 (High Court); *R. v. Tung Chi Hung* (1992), D.Ct., D.C. No. 857 of 1991 (District Court); and *R. v. Fung Shu-shing* (1992), D.Ct., D.C. No. 777 of 1991 (District Court).

98. (1992), D.Ct., S.T.D.C. No. 44 of 1990 (District Court).

99. (1992), H.Ct., H.C. No. 160 of 1989.

100. Article 10 provides, *inter alia*, that in the determination of any criminal charge, all persons shall be entitled to a fair and public hearing.

101. See, in particular, Johannes M.M. Chan, "Undue Delay in Criminal Trials and the Bill of Rights" (1992), 22 *Hong Kong Law Journal* 2; and Byrnes, "The Bill of Rights and Remand in Custody Pending Trial."

102. Johannes M.M. Chan, "The Right to Speedy Trial," in *Hong Kong's Bill of Rights*, pp. 83-97.

103. Cullen, "The Bill of Rights: Some New Perspectives" in *Hong Kong's Bill of Rights.*

104. Cap. 405.

105. See Greg Torodeg and Rita Gomez, "Rights Bill Conflict in Drugs Law," *South China Morning Post*, 5 August 1992, p. 1; and S.Y. Yue, "Ruling to Set Back Fight Against Money Laundering," *South China Morning Post*, 6 August 1992, p. 1. The case was *R. v. Lo Chak-man* (1992), H.Ct., H.C. No. 108 of 1990.

106. In the case of *R. v. Lum Wai Ming* (1992), H.Ct., H.C. No. 75 of 1991, referred to above, the High Court found that most of the redrafted (post *Sin Yau Ming)* presumptions in the Dangerous Drugs Ordinance (1969) did *not* offend the Bill of Rights. The only provision repealed, section 47(1)(c), stipulated that any person found with the keys to a motor vehicle containing a dangerous drug shall be presumed, until the contrary is proved, to have had the drug in his possession.

107. See, for example, D.M. Hodson, (Chief Superintendent, Royal Hong Kong Police), "Criminal Investigation," in *Hong Kong's Bill of Rights*, pp. 9-16. See also Chan, "The Legal System", chap. 2. Contra, newspaper reports, see note 105.

108. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, pp. 145-47.

109. Professor Hogg describes the Supreme Court of Canada test as exceedingly vague and productive of highly variable results, which he convincingly documents. See Hogg, *Constitutional Law of Canada*, 3d ed., chap. 49, sec. 49.5.

110. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, p. 416.

111. Chan, "Undue Delay in Criminal Trials and the Bill of Rights," p. 13.

112. Ibid., p. 14.

113. Hogg, *Constitutional Law of Canada*, 3d ed., chap. 4, sec. 49.4.

114. James Allan, "A Bill of Rights for Hong Kong" [1991] *Public Law* 175. See also James Allan, "Rights without Anchors – Hong Kong Adrift" (unpublished manuscript).

115. This list is not exhaustive, of course, and there are potent arguments that my prognosis is too optimistic. See, for example, Allan, "A Bill of Rights for Hong Kong," p. 175.

Interpreting The Hong Kong Bill Of Rights

Nihal Jayawickrama

The Hong Kong Bill of Rights, which came into operation on 8 June 1991, is contained in three, possibly four, separate documents. The Hong Kong Bill of Rights Ordinance (the Ordinance), which is an ordinary enactment of the local legislature, seeks to incorporate into domestic law the provisions of the International Covenant on Civil and Political Rights (the Covenant) as applied to Hong Kong. An amendment to the Letters Patent, the territory's constitution, enjoins the legislature in the following terms:

> VII(3). The provisions of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, as applied to Hong Kong, shall be implemented through the laws of Hong Kong. No law of Hong Kong shall be made after the coming into operation of the Hong Kong Letters Patent (No.2) that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that Covenant as applied to Hong Kong.

The recurring expression "as applied to Hong Kong" with reference to the Covenant probably means "subject to the reservations made by the British Government in regard to the performance of its obligations in respect of Hong Kong." Since one or more, or indeed all, of these reservations may be withdrawn at any time, the concept "as applied to Hong Kong" is a variable one, subject to change. Its exact meaning, at any point of time, can be authoritatively ascertained only from the Secretary-General of the United Nations with whom instruments of ratification and accession are required to be deposited.

The Ordinance states that "all pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed."[1] It also empowers any court or tribunal whose jurisdiction is invoked to grant such remedy or relief or make such order in respect of a breach, violation, or threatened violation of the Ordinance, as it considers appropriate and just in the circumstances. Its effect on subsequent legislation, however, is minimal. All such legislation "shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights."[2] It is the Letters Patent that

establishes the Covenant as the standard or measure by which future legislation is to be judged, by prohibiting the enactment of any law which restricts the rights and freedoms of the individual in a manner which is inconsistent with the Covenant as applied to Hong Kong.

The primary source of human rights law in Hong Kong is, therefore, the Covenant. In no other country within the Commonwealth, be it dependent or independent, has the unmodified text of the Covenant been adopted as the domestic norm.[3] Since 1959, when the British Government provided Nigeria with a Bill of Rights which was based on the European Convention on Human Rights, bills of rights modelled on that of Nigeria, but modified to suit the varying local circumstances, have found their way into the constitutions not only of dependent territories but also of nearly forty independent states of the Commonwealth. The exceptions were the statements of fundamental rights in the Constitutions of Trinidad and Tobago (which were based on the 1960 Canadian Bill of Rights), of Singapore (which was similar to that in the Constitution of Malaya and was based on the 1949 Indian model), of Sri Lanka (which was essentially home-grown), and, of course, the 1982 Canadian Charter of Rights and Freedoms. The latter, by introducing age and mental or physical disability as prohibited grounds of discrimination, appears to be at least a step ahead of contemporary human rights instruments.

During the first twelve months of its operation, several provisions of existing law were challenged as being inconsistent with the Hong Kong Bill of Rights Ordinance. A common law-oriented Court of Appeal, whose judges had stubbornly declined to familiarize themselves in advance with the emerging body of international human rights law,[4] was now required to respond to this challenge in a wholly new jurisdiction. This paper seeks to examine the manner in which that Court has approached the task of interpreting the Bill of Rights – in particular, the sources relied upon or ignored by appellate judges in determining the scope and content of the constitutionally entrenched rights and freedoms.

The General Approach

In *R. v. Sin Yau Ming*,[5] the Court of Appeal had before it for the first time a question relating to the application of the Bill of Rights. The matter in issue was the validity of reverse onus provisions in the Dangerous Drugs Ordinance. At the outset the Court explained the nature of the new human rights regime:

> It needs to be emphasized that the only duty of this, or any other court, considering legislation is to decide whether that legislation is or is not inconsistent with the Hong Kong Bill. This, or any other court, does not repeal legislation. That is done by the Hong Kong Bill itself. This, or any other court, does not redraft legislation or for that matter make suggestions for the form of future legislation. The content of legislation is viewed, with what will be seen to be an entirely new jurisprudential view, and the court gives its opinion whether, bearing in mind Hong Kong circumstances, that legislation is inconsistent with the Hong Kong Bill.

Noting that the purpose of the Hong Kong Bill of Rights Ordinance was "to provide for the incorporation into the law of Hong Kong of the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong," Silke V-P. observed that the Ordinance

> should be interpreted by the court as being intended to carry out the state's treaty obligations and not in any manner inconsistent therewith provided the words of the statute are reasonably capable of bearing such meaning.

He added:

> I accept, and it is not a matter of controversy, that we should view the Hong Kong Bill as being sui generis. Sections 3 and 4... make it clear that all existing and all new legislation is required to be consistent with the Covenant. Therefore, the Covenant becomes supreme. Not the legislature.

Having referred to the preamble to the Covenant, Silke V-P. concluded his authoritative introductory statement, which was both appropriate and timely:

> In my judgment, the glass through which we view the interpretation of the Hong Kong Bill is a glass provided by the Covenant. We are no longer guided by the ordinary canons of construction of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give "full recognition and effect" to the statement which commences the Covenant. From this stems the entirely new jurisprudential approach to which I have already referred.

Sources of Interpretation

The Travaux Préparatoires

The interpretation clause in the Ordinance specifically requires that

> in interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong.[6]

Where a statutory provision corresponds with a provision in a treaty which the statute is enacted to implement, such provision ought to be construed by the court in accordance with the meaning to be attributed to the treaty provision in international law. In the Australian case of *Koorwarta v. Bjelke-Petersen et al.*,[7] Brennan J. explained this principle thus:

> When Parliament chooses to implement a treaty by a statute which uses the same words as a treaty, it is reasonable to assume that Parliament intended to import into municipal law a provision having the same effect as the corresponding provision in the treaty. A statutory provision corresponding with a provision in a treaty which the statute is enacted to implement should be construed by municipal courts in accordance with the meaning to be attributed to the treaty provision in international law. Indeed, to attribute a different meaning to the statute from the meaning which international law attributes to the treaty might be to invalidate the statute in part or in whole, and such a construction of the statute should be avoided. The method of construction of such a statute is therefore the method applicable to the construction of the corresponding words in the treaty.

A treaty, in turn, is required to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[8] Among the material to which a court may have recourse for the purpose of interpreting a treaty provision are the preparatory work of the treaty, the circumstances of its conclusion, and any explanatory report published with the text.[9] There is, however, no reference in any of the nine judgments so far delivered by the Court of Appeal of recourse having been had to the travaux préparatoires for the purpose of understanding the drafting history of any of the contentious provisions of the Covenant.

The Jurisprudence of the Human Rights Committee

The "general comments" on the scope and content of the articles of the Covenant made following the examination of reports submitted by states parties under Article 40, and the "views" expressed on a consideration of individual communications submitted under the Optional Protocol, may be regarded as the "jurisprudence" of the Human Rights Committee.[10]

In *Sin Yau Ming*, Silke V-P. acknowledged that "guidance" may be derived from the jurisprudence of the Committee, although

> I would hold none of these to be binding upon us though in so far as they reflect the interpretation of articles in the Covenant, and are directly related to Hong Kong legislation, I would consider them as of the greatest assistance and give to them considerable weight.

In seeking guidance, however, he proceeded rather cautiously:

> The Court should bear in mind that these are general comments and...that the perspective adopted is to consider the international treaty obligations of state parties. Matters of principle are there stated in the widest and most general of terms so that all the individual state parties, and there is a multiplicity of them with differing legal traditions and social aspirations, may interpret them more meaningfully. Further, the Committee, under the Optional Protocol, is normally concerned with individual petitions from citizens of the state parties who are aggrieved by particular decisions of their domestic courts and who have exhausted all domestic avenues of redress.... The approach differs from that of a domestic court whose task is to determine the constitutionality or otherwise of domestic legislation measured, as is the case in Hong Kong, against an entrenched instrument. So they are helpful but not always apposite.

In the same case, Kempster J.A. referred to the views of the Committee in *Pietraroia v. Uruguay*,[11] and found in them "a substantial identity of approach" with European and United States jurisprudence. Adopting that approach, the Court held that:

> A mandatory presumption of fact may be compatible with s.8 Article 11(1) of the Hong Kong Bill of Rights Ordinance [Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law] if it be shown by the Crown, due regard being paid to the enacted conclusions of the legislature, that the fact to

> be presumed rationally and realistically follows from that proved and also if the presumption is no more than proportionate to what is warranted by the nature of the evil against which society requires protection.

Sections 46 and 47 of the Dangerous Drugs Ordinance, having failed when subjected to this test, were accordingly declared to have been repealed.

In *The Queen v. Lam Wan-kow and Yuen Chun-kong*,[12] the Court of Appeal examined the effect of the Hong Kong Bill of Rights Ordinance on the presumption in Section 46 of the Dangerous Drugs Ordinance (referred to above) in respect of a conviction entered prior to the coming into operation of the Bill of Rights. In interpreting the expression "according to law" in Article 11(4) of the Ordinance [Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law], Yang C.J. found support for his preferred view in General Comment 13(21) of the Human Rights Committee concerning Article 14 of the Covenant, as well as in the views expressed in Communication No.64/1979. Accordingly, he concluded that the term "according to law"

> does not relate to the specific offence laws applicable at the time of conviction or at the time of appeal but means...the laws which exist and existed to enable the court of appeal to exercise its appellate functions.

In *The Queen v. Man Wai Keung*,[13] the Court of Appeal held that Section 83XX(3)(a) of the Criminal Procedure Ordinance, which provided that an appellant who successfully appealed against his conviction but was ordered to be re-tried shall not be entitled to costs, was inconsistent with Article 10 of the Ordinance [All persons shall be equal before the courts and tribunals], and was therefore repealed. For the purpose of determining the meaning of the term "discrimination," which was not defined either in the Ordinance or in the Covenant, Silke V-P. referred to the General Comments of the Human Rights Committee formulated at its 948th meeting (37th Session):

> ...the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Adopting that definition and reaffirming that Article 1(1) of the Ordinance [The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] provided "the glass through which the rights recognized in succeeding Articles...shall be considered," he held that

> to deprive a person from access to the court's discretion for no apparent good reason...violates the declaratory opening of Article 10. It is not "a reasonable limit" on equality as can be "demonstrably justified in a free and democratic society." Some people are not less equal before the law and less entitled to the protection of the law than others.

The Jurisprudence of Regional Human Rights Institutions

Both the European Convention on Human Rights and the American Convention on Human Rights contain provisions which are similar, if not identical, to those in the Covenant. During the past thirty-six years, the European Commission of Human Rights has received 57,190 applications from aggrieved individuals and associations and occasionally from concerned states parties. Of them, 17,116 have been registered and dealt with. Since its creation in 1959, the European Court of Human Rights has delivered 235 judgments.[14] Together these two institutions have helped to create a very substantial jurisprudence on the interpretation and application of contemporary human rights norms. Similarly, the Inter-American Commission of Human Rights, which has its seat in Washington, and the Inter-American Court, which sits in San Jose, Costa Rica, now interpret, apply, and enforce the American Convention. The African Commission of Human Rights, which was established in 1986 under the African Charter on Human and People's Rights, is another potential source of useful jurisprudence.

In *Sin Yau Ming*, the Court of Appeal made extensive reference to European jurisprudence. However, Silke V-P. cautioned that the reservations he had in respect of the Human Rights Committee applied equally to the European Commission and Court:

> They operate as supra-national tribunals empowered to scrutinize the conduct of different branches of the governments of the state parties to the European Convention on Human Rights. They look to see whether the handling of a particular case in a complaint against the state party in its domestic jurisdiction has infringed the rights of the complainant under that Convention.... So they are helpful but not always apposite.

For instance, he had this to say of *Salabiaku v. France*, which was one of a number of European decisions on which the Crown suggested that reliance be placed:[15]

> *Salabiaku* did consider presumptions but did not, as Mr. Fung puts it, "grasp the nettle" for it found that France had not made use of presumptions in any event. It would appear from the judgment that the French courts were considered to have treated as permissive that which in our law would be considered an instance of strict liability – a possessor of prohibited goods is deemed liable for the offence of smuggling prohibited goods. The European Court did however appear to take the view that presumptions are not, ex facie, prohibited.

In the same case, both Kempster J.A., who examined several European decisions, and Penlington J.A. relied on *Salabiaku* in order to construe the expression "according to law" in Article 11(1) of the Ordinance. Accordingly, both judges held the word "law" to mean not the domestic law of Hong Kong but a universal concept of justice or as including a reference to international treaty obligations.

In *Lam Wan-kow*, Yang C.J. sought assistance from both *Salabiaku* and *Winterwerp v. Netherlands*[16] in order to interpret the expression "according to law" in Article 11(4) of the Ordinance. In The *Queen v. Fu Yan*,[17] Silke V-P. relied on *Artico v. Italy*,[18] *Pakelli v. Germany*,[19] and *J v. Austria*,[20] in holding that Article 11(2)(d) of the Ordinance [In the determination of any criminal charge against him, everyone shall be entitled...to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it] applies to appellate proceedings.

The Queen v. Sin Hoi[21] was an appeal lodged by an accused person remanded in custody whose application for bail had been refused by a High Court judge. Fuad V-P. (with Nazareth J.A. and Bewley J. agreeing) held that under the Supreme Court Ordinance, the Court of Appeal had no jurisdiction to entertain such an appeal, its appellate jurisdiction being limited in such matters to applications for habeas corpus dealt with by the High Court. Fuad V-P. observed that

> the rule of law, upon which the protection of fundamental rights and freedoms ultimately depends, would have no meaning if a court were to assume jurisdiction not conferred upon it by the legislature.

In his view, the Bill of Rights Ordinance did not confer appellate jurisdiction on any court which it did not otherwise possess. The ordinary law relating to appeals was not thereby overridden.

If Fuad V-P. had had recourse to the jurisprudence of the European Court, he might well have held otherwise. In *Brogan v. United Kingdom*,[22] that Court, in interpreting Article 5(4) of the European Convention which is almost identical to Article 5(4) of the Bill of Rights Ordinance, held that the notion of "lawfulness" of an arrest or detention had to be determined in the light not only of domestic law, but also of the text of that Convention and the general principles embodied therein.[23] In *X v. United Kingdom*,[24] the European Court had previously held that although the applicant in that case had had access to a court which had ruled that his detention was "lawful" in terms of English law, that could not of itself have been decisive as to whether there was a sufficient review of "lawfulness" for the purposes of Article 5(4) of the Convention. In the circumstances of that case, habeas corpus proceedings were considered to be inadequate to secure the full enjoyment of the right guaranteed by Article 5(4). These decisions suggest that Article 5(4) of the Ordinance creates a new and substantive right and a remedy and, consequently, a new jurisdiction, which prevails over existing law.

Commonwealth Jurisprudence

For over thirty years the Foreign and Commonwealth Office in London has been adapting its standard draft Bill of Rights – originally prepared for Nigeria in 1959 and modelled on the European Convention on Human Rights – for inclusion in the constitutions of dependent and about-to-be-independent territories. Several of these are still in operation, and a considerable body of jurisprudence is now available in published form from countries such as Nigeria, Cyprus, Mauritius, Zimbabwe, and the Caribbean territories. Additionally, human rights case law is also forthcoming in large measure from India and Canada and to a lesser extent from Sri Lanka.

From these extraordinarily rich reserves, Hong Kong's Court of Appeal has demonstrated an abiding, exclusive partiality for Canadian judicial wisdom, despite the fact that the Canadian Charter of Rights and Freedoms is, in some respects, significantly different from its own Bill of Rights. For instance, the concept of "such reasonable limits prescribed by law as can be demonstrably justified in a free and demo-

cratic society," which regulates the application of the guaranteed rights in Canada, is unknown to the Hong Kong Bill of Rights. Nor are the Canadian "principles of fundamental justice" a part of Hong Kong law.

In *Sin Yau Ming*, Silke V-P., having referred to the jurisprudence of the Human Rights Committee and the Strasbourg institutions, observed that

> greater assistance can be derived from those two common law jurisdictions, the United States of America and Canada, which have constitutionally entrenched Bills of Rights.

All three judges (Silke V-P., Kempster J.A., and Penlington J.A.) were considerably influenced by post-Charter decisions in applying the Canadian rationality and proportionality tests to determine the validity of reverse onus provisions in Hong Kong legislation. So were the judges in *Lam Wan-kow* (Yang C.J., Silke V-P., and Macdougall J.A.) who adopted the principles laid down in a number of Canadian decisions on the meaning of the phrase "prescribed by law," in interpreting the expression "according to law" in the Hong Kong Bill of Rights. In *Man Wai Keung*, Nazareth J.A. sought guidance from "the depth and learning in relevant Canadian authorities" before holding that a legislative provision that denied costs to a successful appellant ordered to face a retrial had neither an identifiable objective nor measured up to the rationality and proportionality tests, and was, therefore, discriminatory.

In *Fu Yan*, the Court (Silke V-P., Macdougall J.A., and Bewley J.) was called upon to examine the question whether "the interests of justice" required that an accused person who wished to appeal against his conviction should have been provided with the full transcript of his trial proceedings and should have had legal assistance assigned to him. In answering these questions, the Court appeared to have been considerably influenced by a decision of the Alberta Court of Appeal that neither the guarantee of fundamental justice nor the guarantee of equality before the law entitled the applicants in that case to the preparation of appeal books at public expense or the provision of counsel at public expense. Silke V-P. cited the headnote in the Alberta case that[25]

> it is not historically supportable to say that it is a principle of fundamental justice that an appellant can demand publicly funded transcripts for an appeal as of right,

and

> history does not confirm that the provision of counsel is necessary to a fair trial.

Accordingly, he held that under Article 11 of the Hong Kong Bill of Rights Ordinance there was no absolute right to legal aid in criminal trials, nor any reason whatsoever to provide a full transcript of the trial proceedings. The Court appears to have overlooked the significance of provisions in the Hong Kong Bill of Rights that guaranteed an accused person the right "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it" and the right "to have adequate time and facilities for the preparation of his defence." Neither of these provisions appears in the Canadian Charter of Rights and Freedoms.

The Jurisprudence of Other International Human Rights Tribunals

The comments and views of monitoring bodies established under other international human rights instruments may be a useful source for the interpretation of relevant concepts. Two such bodies are the Committee against Torture, established under the Convention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Committee on the Elimination of Racial Discrimination, established under the Convention on the Elimination of All Forms of Racial Discrimination. The Court of Appeal has so far made no reference to either source.

International Human Rights Guidelines

In *The Queen v. Beauregard*,[26] the Supreme Court of Canada, in examining the validity of a statutory provision which was challenged on the grounds that it violated the independence of the judiciary established by the Constitution and infringed the fundamental right to equality before the law enshrined in the Canadian Bill of Rights, referred, *inter alia*, to the Code of Minimum Standards of Judicial Independence formulated by the International Bar Association (1982), the Universal Declaration of the Independence of Justice (1983), and the Syracusa Draft Principles on the Independence of the Judiciary (1981). None of these were binding international instruments, nor were they resolutions adopted by governments. Yet, in the view of Dickson C.J., they were

> important international documents [which] have fleshed out in more detail the content of the principle of judicial independence in free and democratic societies.[27]

Similarly, in *A Juvenile v. The State*,[28] the Supreme Court of Zimbabwe referred to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules) in considering whether the imposition of a sentence of whipping on a juvenile was an inhuman and degrading punishment.

There are several other such codes and guidelines which may also help to interpret the human rights concepts in the Bill of Rights. They include the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment. The Court of Appeal, however, has perhaps not had an opportunity of referring to any of these yet.

An Aberration?

In *Tam Hing Yee v. Wu Tai Wai*,[29] the Court of Appeal (Cons V-P., Clough J.A., and Macdougall J.A.) had before it a decision of a District Judge (Judge B.W.M. Downey) that Section 52E of the District Court Ordinance, which empowered him to prohibit a judgment-debtor from leaving Hong Kong, was inconsistent with the right to freedom of movement and had, therefore, been repealed. Adopting a singularly narrow, more common law-oriented approach to interpretation, the Court reversed this decision principally on the ground that the question arose out of an "inter-citizen dispute" and that the Bill of Rights had no application to such matters since, according to Section 7:

> This Ordinance binds only –
> (a) the Government and all public authorities; and
> (b) any person acting on behalf of the Government or a public authority.

According to Cons V-P., that provision was a clear indication "that private individuals should not be adversely affected by the Ordinance, as the judgment-creditor would in the present instance be if, assuming for the moment that Section 52E is in fact consistent with the Ordinance, the judge's construction be correct."

Adding that it was not necessary for him to do so, Cons V-P., nevertheless, proceeded to consider whether the impugned provision was

"necessary" to "protect the rights and freedoms of others" (in this instance, the rights of the judgment-creditor). Without adverting to any jurisprudence on the subject from any source whatsoever and without any analysis of the relevant concepts, he answered in the affirmative. Indeed, he rejected Judge Downey's reliance upon the decision of the European Court of Human Rights in *The Sunday Times v. United Kingdom*[30] that "necessary" in this context meant "a pressing social need":

> In assessing whether or not that is so we do not, with the very greatest respect, feel that the court is assisted by substituting for necessity some phrase such as "pressing social need", or considering whether the restriction in question is reasonable and demonstrably justified in a free and democratic society.... The court must instead direct its mind to factors such as what would be likely to happen if the restriction were removed or by what alternatives might the stated objectives be otherwise achieved.

He elaborated:

> There are many jurisdictions with which Hong Kong has no reciprocal arrangements for the enforcement of judgments, which may thus provide a safe haven for the judgment debtor who wishes to evade his responsibility, even if the creditor knows where he is, which may often not be the case. With modern means of travel these havens are easily and quickly attained.... However it is not always a matter of commercial interest. Although no actual evidence has been put forward – we are told statistics are difficult to come by – we understand from the Bar that the Director of Legal Aid alone handles an average of 20 applications each year, mostly for the benefit of deserted wives, whose defaulting husbands would, in many instances, be otherwise likely to disappear across the border with the People's Republic of China.

Cons V-P. also thought, but did not so conclude, that the prohibition on travel may even be necessary in the interests of "public order":

> It is not uncommon to find in the criminal jurisdiction of the courts that those commonly known as "loan sharks" do not hesitate to employ strong arm tactics to recover sums of money they allege to be due from their victims. If those with monies lawfully adjudged due to them were compelled to watch debtors calmly pack their bags and leave, some might well succumb to the temptation likewise to take the law into their own hands.

In delivering judgment in this case, Cons V-P. chose to ignore the wealth of international jurisprudence which another bench of the same court had considered to be "of the utmost assistance" in interpreting the Bill of Rights. Consequently, he proceeded to attribute an expansive meaning to the limiting term "necessary." The protection of the rights and freedoms of others – an exceptional situation in which the exercise of a guaranteed right may be restricted by law – was also given a wide and sweeping definition which resulted in a judgment-creditor's "right" to recover a sum of money due to him being equated with an individual's fundamental right to freedom of movement, which is now guaranteed by both international and domestic law. However, it was by introducing the concept of "inter-citizen rights" (whatever that expression might mean) into the human rights discourse in Hong Kong that Cons V-P. sought to limit unjustifiably the reach of now universally accepted human rights concepts. By holding that the Bill of Rights did not apply to "inter-citizen rights," the Court introduced an unfortunate element of confusion into the emerging human rights jurisprudence in the territory.

The simple question at issue in this case was whether a District Court had jurisdiction to make a prohibition order on a judgment-debtor, thus preventing him from leaving Hong Kong whenever he chose to do so. A law enacted prior to the Bill of Rights Ordinance conferred that power on the District Court. Was that "existing law" repealed by reason of being inconsistent with the right to freedom of movement guaranteed in the Bill of Rights? If so, it was not competent for the District Judge to issue a prohibition order. The fact that the parties to the dispute were "two citizens," a judgment-creditor and a judgment-debtor, ought to have been irrelevant, since the law remains the same whether invoked by an official or a private citizen. The District Court either has or does not have a particular jurisdiction.

Indeed, the reference to the expression "inter-citizen rights" was entirely misconceived. It owed its origin and rapid demise to an abortive proposal made in the early stages of the drafting that the provisions of the Bill of Rights be regarded as binding not only on the government and public authorities, but also on all persons acting in their private capacities. Had that proposal been implemented, it may have been possible, for example, for one individual to invoke the Bill of Rights to obtain access to personal and private documents in the possession of another, on the basis that he was exercising his "freedom to seek information" guaranteed by Article 16. If the Bill of Rights was

"binding" on "all persons," the latter may have been obliged to provide access to such documents. In view of the possibility of such serious incursions into personal privacy, that proposal was abandoned.

Conclusion

If one were to assume that *Tam Hing Yee* was the unfortunate exception where the Court failed to heed the warning of a distinguished jurist that a Bill of Rights ought not to be interpreted as if it were a Last Will and Testament, the generous and purposive approach to interpretation generally adopted in the other cases appears to hold out the following promise. With time and an increasing familiarity with international human rights norms, the Court may indeed fashion the Bill of Rights into a living, dynamic document capable of responding to the changing needs, demands, and priorities of a vibrant society. This is a challenge which the Court will probably be called upon to face shortly with the "defreezing" at the end of the first year of six politically and socially sensitive statutes.

The continuing opposition of the Government of the People's Republic of China to the implementation of the Bill of Rights and the recent appointment to the Court of Appeal of one of the strongest critics of human rights legislation will only serve to compound that challenge. The new judge, who will probably preside over the judicial transition in 1997, was a leading member of the Hong Kong Bar when the Bill of Rights was being drafted. He thought then that the draft Bill was an "odd document" with "some bizarre provisions" that "burns up much of the fabric" of Hong Kong society and "tears up much of the fabric of Hong Kong law." It was "legislation bought off-the-peg from overseas," containing "odd concepts and strange prohibitions," sometimes "expressed in bad French," which left one "wholly disoriented." It was "similar to the ravings of Adolf Hitler in his bunker during the last days of the Third Reich" and, in his view, if the general public "really sinks its teeth into the text of the Bill and analyses its import, there would be a public outcry." He predicted that the Bill of Rights would become "a port of first asylum for every lawyer whenever a client has a grievance to ventilate."[31]

While the predisposition for Canadian jurisprudence has undoubtedly contributed towards the liberal approach that the Court of Appeal has so far adopted, it may be useful to bear in mind the caution which the Supreme Court of Canada administered to itself when invited to follow freely the American human rights experience:

> While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances.[32]

At the same time, it would be fortifying for the Court to seek actively jurisprudence from other sources as well. As Chief Justice Dumbutshena of Zimbabwe observed in *A Juvenile v. The State*,[33]

> the courts of this country are free to import into the interpretation of [the Bill of Rights] interpretations of similar provisions in international and regional human rights instruments such as, among others, the International Bill of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human Rights. In the end international human rights norms will become part of our domestic law. In this way our domestic human rights jurisdiction is enriched.

Notes and References

1. Hong Kong Bill of Rights Ordinance, Sec. 3.

2. Ibid., Sec. 4.

3. However, the right of self-determination (Article 1 of the Covenant) is not included in the Ordinance. No explanation for this omission has yet been offered.

4. The judges declined an invitation to attend an international conference on the Bill of Rights which was organized by the University of Hong Kong within three weeks of the coming into operation of the Bill of Rights. In fact, only one High Court Judge and one District Judge participated in that conference. A Vice-President of the Court of Appeal, who inaugurated the conference, left immediately after delivering his keynote address.

5. [1992] 1 H.K.C.L.R. 127.

6. Sec. 2(3).

7. (1982), 153 C.L.R. 168, at p. 265.

8. Vienna Convention on the Law of Treaties 1969, Art. 31(1).

9. Ibid., Art. 32. See also *Read v. Secretary of State for the Home Department*, [1989] L.R.C. (Const.) 349, per Lord Bridge, at p. 356. A summary of the different views expressed by states during the drafting of the Covenant is contained in Marc J. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987).

10. For "general comments," see CCPR/C/21/Rev.1, and CCPR/C/21/Rev.1/ Add.1, 2 and 3. The "views" are published in *Selected Decisions under the Optional Protocol* (Second to Sixteenth Sessions) (New York: United Nations, 1985); *Selected Decisions of the Human Rights Committee under the Optional Protocol* (Seventeenth to Thirty-Second Sessions) (New York: United Nations, 1990); and in the *Annual Reports* of the Human Rights Committee submitted to the United Nations General Assembly.

11. Communication No. 44/1979, in *Selected Decisions of the Human Rights Committee*, vol. 1, p. 76.

12. [1992] 1 H.K.C.L.R. 272.

13. (1992) C.A., Crim. App. No. 403 of 1990.

14. *European Commission of Human Rights: Survey of activities and statistics* (Strasbourg: Council of Europe, 1991); *European Court of Human Rights: Survey of activities, 1959-1990* (Strasbourg: Council of Europe, 1991). For European jurisprudence, see *European Human Rights Reports, Decisions and Reports of the European Commission of Human Rights*, and *Digest of Strasbourg Case Law Relating to the European Convention on Human Rights.*

15. (1988), 13 E.H.R.R. 379.

16. (1979), 2 E.H.R.R. 387.

17. [1992] 2 H.K.C.L.R. 76.

18. (1980), 3 E.H.R.R. 1.

19. (1983), 6 E.H.R.R. 1.

20. 34 Decisions and Reports 96.

21. [1992] 1 H.K.L.R. 408.

22. (1989), 11 E.H.R.R. 117.

23. Ibid., pp. 136-37.

24. (1982), 4 E.H.R.R. 188.

25. *R. v. Robinson* (1989), 73 C.R. (3d) 81.

26. [1987] L.R.C. (Const.) 180.

27. Ibid., p. 191.

28. [1989] L.R.C. (Const.) 774.

29. [1992] 1 H.K.L.R. 185.

30. (1979), 2 E.H.R.R. 245.

31. See Henry Litton Q.C., "Much Wrong with the Bill of Rights," *South China Morning Post*, 3 April 1990; and "A Conflict of Interests," *South China Morning Post*, 14 May 1990.

32. *R. v. Rahey*, [1987] 1 S.C.R. 588, per La Forest J., at p. 639.

33. [1989] L.R.C. (Const.) 774, at p. 782.

The Right to Information in Hong Kong

Eva Lau

Introduction

Canada has a federal Access to Information Act,[1] and a number of provinces also have their own access to information statutes applicable to records held by the provincial governments. The United States has the Freedom of Information Act, which is of an even longer history. In contrast, Hong Kong does not have any statute expressly giving or denying the right to information, nor is there any suggestion that the government is going to introduce one in the foreseeable future. Nonetheless, the Hong Kong Bill of Rights Ordinance, enacted in 1991, may have some implications on the right to information. This paper will discuss some relevant provisions of the Hong Kong Bill of Rights and their implications.

The Common Law Position

As I have mentioned, there is as yet no legislation governing the right to information in Hong Kong. The applicable law is the English common law, subject to the provisions of the Hong Kong Bill of Rights which will be discussed later in this paper. The government discloses whatever it chooses to disclose in whatever manner it so wishes. Government officials are restrained by the Official Secrets Act of the United Kingdom, which has been extended to Hong Kong by an Order in Council, from disclosing government information. Furthermore, publication of government information, such as memoirs of former government officials, can be a breach of confidence under common law and may be enjoined by the government on the ground of public interest.[2]

Therefore, at present there is no procedure by which the government can be compelled to disclose any information it is holding or even to reveal what sort of information it possesses. Apart from various statutory registers, such as those at the Companies Registry or the Marriage Registry, that the government maintains and which can be searched for a fee, the only exception may be the government papers made available to the public in the Public Records Office. Like its counterpart in the United Kingdom, the Public Records Office only allows inspection of state records which are at least thirty years old. It will soon be time for disclosure of government records of the 1960s, and it will be interesting

to see how the Hong Kong Government reacted when the Cultural Revolution began in the People's Republic of China (PRC) in 1967 and thousands of refugees flocked to Hong Kong. Deliberations such as these thirty years ago probably still have a bearing on how events are shaped at present, but that does not assist us in knowing what the government is doing today.

Since there is no statutory procedure to obtain government records except those in the Public Records Office, any right to information in Hong Kong can only be an empty right, if such a right exists in the first place. However, it is arguable that such a privilege does exist under the Hong Kong Bill of Rights, and the Hong Kong Government should, it is submitted, enact legislation to reflect that right.

Justifications for the Right to Information

Before I go on to discuss the relevant provisions of the Hong Kong Bill of Rights, I wish to raise a number of reasons why the right to information is vital in the context of Hong Kong. The general objectives of access to information legislation were well debated in Canada at the time of passing of the federal act. Here, I wish to raise four issues in the circumstances of Hong Kong.[3]

Accountability of Government

Hong Kong has been ruled for the past 150 years as a British Crown colony. Democracy is considered to be present there only in the sense that the Hong Kong Government is accountable to the British Government, which is elected by the British public. However, this particular form of elective government cannot exist beyond 1 July 1997, when the PRC resumes sovereignty over Hong Kong. We are now in the latter part of the transition period, when a number of changes in government structure have been rapidly taking place – the most important of such changes probably being the development of representative government.

In September 1991, direct elections for members of the Hong Kong Legislative Council were held for the first time, although the directly elected seats (18) constituted less than one-third of the legislature (60). As the matter now stands, the number of directly elected Legislative Council members will increase slightly from 18 to 20 in 1995.[4] According to the Basic Law of the future Hong Kong Special Administrative Region (HKSAR) promulgated in April 1990, which will become the constitution of Hong Kong when the PRC resumes sover-

eignty, there will be direct and indirect elections for the Chief Executive as well as members of the Legislative Council of the HKSAR. Eventually all such public offices will be generally elected, it is hoped, by the year 2007.[5]

As can be seen from the brief description above, the Hong Kong public is not very experienced in electing their government leaders, nor are political leaders experienced in being elected to govern. Thus, it is important that the public should know what the government is doing – how it makes decisions and policies – in order to assess the government and to know how to vote. The right to information is thus vital for the working of a democratic society and, particularly so, when Hong Kong is trying to transform itself into a more representative one.

Public Participation

Formerly, pressure groups and interest groups in Hong Kong could only try to influence government decisions from outside. Now they themselves can become part of the government, for example popular union leaders being elected to the Legislative Council. The right to information is important not only in assessing what the government is doing, but also in encouraging and enhancing the ability of interested persons to participate in government and to join together to form political parties. Again, these are essential elements of a democratic society.

Fairness in Decision Making

To ensure that there is fairness in the decision making process of the Hong Kong Government, those individuals whose lives and interests are affected should have a right to the relevant information considered by the administrative decision-maker. On the one hand, this means that the individuals concerned should be given access to the materials which the decision-maker will consider, including the criteria on which the determination will be based. On the other hand, the affected individuals should be allowed to present their case and to answer any allegations made against them. This is of singular importance if the rights and freedoms guaranteed in the Hong Kong Bill of Rights are to be carried into effect and not be violated in secret.

Protection of Privacy

Article 14 of the Hong Kong Bill of Rights, which is identical to Article 17 of the International Covenant on Civil and Political Rights (ICCPR),

provides against arbitrary or unlawful interference with the individual's privacy. Undoubtedly, the government holds a lot of personal information about each individual, although at present there is no way of knowing how much and what information the government has. The way that identity records of the population are held demonstrates clearly the possible monitoring by the government of public activities. By law, every person in Hong Kong has to carry with him or her, everywhere within the territory, an identity card containing his or her photograph, together with a number of coded information, and has to produce it to police upon request. This is supposedly a measure against illegal immigration. However, once the identity card number is obtained, it can lead to a number of government files on the person, such as income tax returns or immigration records of movements in and out of Hong Kong.

Thus, in accordance with the letter and spirit of Article 14, it is the right of the individual to obtain information held by the government on him or her and to correct such information if necessary. It is also the right of the individual to acquire information on the decision making processes and actions of the government that affect him or her. It is only then that the individual can seek remedy if his or her privacy has been arbitrarily or unlawfully interfered with.

However, privacy can also be unjustifiably interfered with if there is unwarranted disclosure of personal information held by the government to other third parties. For the protection of privacy, then, it is necessary for there to be measures against disclosure of personal information other than to the person to whom the information relates.

For the above reasons, I would argue that the people of Hong Kong should have a right of access to information held by the government, albeit with restrictions.

The Hong Kong Bill of Rights

The Hong Kong Bill of Rights Ordinance was passed in June 1991 and came into operation on June 8.[6] Its stated purpose is to incorporate into the law of Hong Kong the provisions of the ICCPR as applied to Hong Kong.[7] The Hong Kong Bill of Rights is contained in Part II of the Ordinance and is basically a reproduction of the ICCPR.

Article 16 of the Hong Kong Bill of Rights, which is identical to Article 19 of the ICCPR, is entitled "Freedom of opinion and expression" and provides as follows:

(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary –
  (a) for respect of the rights or reputations of others; or
  (b) for the protection of national security or of public order (ordre public), or of public health or morals.

This is the Article that we need to look at closely here.

Freedom of Expression

In Article 16(2), freedom of expression is defined to include the freedom to "seek" and "receive" information, besides that of imparting information and ideas. Therefore, the right to freedom of information guaranteed by the Article will be violated if individuals are denied the right to receive information, in just the same way as being denied the right to impart information and ideas of all kinds. This Article specifically includes both types of activities within its ambit.

This argument has been made by Clare Beckton[8] in the context of Article 10 of the European Convention on Human Rights and Article 19 of the ICCPR (which has the same wording as Article 16(2) of the Bill of Rights). In respect to the former, this has been said:

> ...that freedom of expression, as it relates to the media, includes freedom to "seek, receive, impart, publish and distribute information and ideas." Along with that arguably lies a duty upon public authorities to make information available on matters of public interest, within reasonable limits. This suggests that freedom of expression would be infringed if governments and public authorities refused to disclose information, unless there was a justifiable reason for so doing.
>
> As a corollary to the freedom of the media to seek information, the European Court has inferred the right of the public to receive such information.[9]

The last proposition is based on the decision of the European Court in the *Sunday Times* case,[10] which involved an application by the

publisher and editor of the *Sunday Times* against an injunction granted by the English courts.

Essentially, whether Article 16(2) is to be construed to include a right of access to information, besides the right to impart information and ideas, can be considered a matter of statutory interpretation, as the Hong Kong Bill of Rights is in fact an ordinance. However, it is submitted that it should not be interpreted in the same way as any piece of ordinary legislation, but the courts should adopt a wide and purposive approach in its interpretation as is appropriate for a piece of constitutional instrument.[11] This would mean that the clear and express wording of Article 16(2) should be construed in such a way that the freedom of expression guaranteed includes a positive right of access to information and a corresponding duty to provide such information. Therefore, the general rule under Article 16(2) should be that there should be a right of access to information, which can only be restricted when the individual circumstances are such as to fall within an exception or restriction to the general rule.[12]

The right to seek and receive information thus seems to impose a corresponding duty on those whom the Hong Kong Bill of Rights binds to disclose the information. Section 7 of the Hong Kong Bill of Rights Ordinance provides for the binding effect of the Ordinance and is in the following terms:

> (1) This Ordinance binds only –
>
> (a) the Government and all public authorities; and
>
> (b) any person acting on behalf of the Government or a public authority.

"Person" in this section is defined by sub-section (2) to include "any body of persons, corporate or unincorporate." Unfortunately, "public authority" is not defined and will have to await judicial interpretation.

As the Hong Kong Bill of Rights is binding only on the government and public authorities, Article 16(2) can be construed, following from the argument above, to place a positive duty on the government and public authorities to disclose information to individual members of the public. If disclosure of information is refused, it will constitute a violation of the freedom of expression by that government department or public authority, and the individual concerned can apply to a court for remedies under Section 6 of the Ordinance.

If the above argument is correct, then the Hong Kong Bill of Rights has, in effect, reversed the common law position. Whereas under the

common law, the government has no duty to disclose any information and can obstruct disclosure on the grounds of public interest, now under the Hong Kong Bill of Rights, the government and any public authorities can only withhold disclosure if it is justifiable in a free and democratic society.

Restrictions

The restrictions are contained in Article 16 itself. Article 16(3) states that the restrictions must be provided by law and are necessary "for respect of the rights or reputations of others," or are "for the protection of national security or of public order ... or of public health or morals." Let us try to interpret each of these restrictions.

Rights or Reputations of Others

This seems a rather vague and general expression, and should a right to information statute be enacted, it must be more clearly specified. I suggest that it should include the following.

Firstly, the right to information must be subject to the rights of others, as stated in the Hong Kong Bill of Rights itself. To take an extreme example, a person can have no right to information that would affect the right to life of another, such as would allow an intended murderer to obtain information about his or her intended victim. The rights of others must also include a right to privacy as stated in Article 14 mentioned above. This would mean that personal information should only be made available to the individual concerned and not to anyone else.

Secondly, information of a confidential nature should also be exempted from disclosure. Confidential information can be information that is communicated to the government by another person or is created by the government itself about other persons. The former category includes information such as that provided to the government in submitting a tender for contract, whilst government survey results of unauthorized building structures would be an example of the latter type of information.

At common law, any information that is not public knowledge is essentially capable of being confidential information.[13] The case law has shown that a wide range of information can be of a confidential nature. In respect to personal information, examples include private etchings,[14] communication between spouses,[15] and photos taken in a private studio.[16] The rationale behind the protection of these types of personal

confidential information is the respect for individual privacy. Thus, such information in the possession of the government can be protected by the exemption based on privacy, allowing access only to the individuals concerned, and no separate exception need be created on the grounds of confidentiality to protect personal information.

Commercial information and material that has a financial value are very often considered to be confidential. Such information can be a new invention communicated in the course of negotiations of a contract,[17] price lists, and customers lists. In a recent Hong Kong case,[18] questionnaires devised by two academics in conducting medical research were held to be confidential. While the question whether confidential information is a piece of property has not been settled in previous cases, the court held in this case that "[a] man's confidential information is his property," and the courts have the proprietary jurisdiction to protect such property from being misused.

Regardless of the exact nature of confidential information and the basis for its protection, commercially valuable information has always been protected by law. Since there is such long standing legal principle for the protection of commercial confidential information, it clearly establishes a case for exempting such information from disclosure by the government. However, the exemption should be specifically framed and should only extend to information that is not public knowledge and is either a trade secret, a patentable invention, or information the disclosure of which will cause financial loss to the person concerned or will give his or her competitor an unfair advantage.

National Security or Public Order

In the law of confidence concerning cases on government information, national security has very often been the basis for the claim against disclosure.[19] It is justifiable for there to be no right of access to information that would affect international relations of the government, national defence, or military activities. However, it will be a sensitive issue in respect to information concerning the relationship between the governments of Hong Kong and the UK, on the one hand, and the PRC government, on the other. The Joint Liaison Group, established between the UK and the PRC governments to discuss matters arising in the transitional period of Hong Kong, is vowed to secrecy and has not been particularly forthcoming about its negotiations. It is politically unrealistic to expect such information to be available to the public for a long time to come, if it ever becomes available at all.

In relation to the exception based on public order, it is justifiable to exempt information concerning the investigation, prevention, and detection of crimes, the enforcement of the law, the security of penal institutions, the safety of witnesses, and the assurance a fair trial. However, all these are complicated issues and must be clearly set out in the relevant legislation. Leaving the exception to just one sentence in the Hong Kong Bill of Rights is entirely unsatisfactory.

Right to Information and Language

The Problem Stated

Information must be expressed in a language that is understood by an individual before it can be of any use to that person. Even if a procedure allowing access to information is enacted, in practice, the records are still denied to those who do not understand the language in which the records are kept. Thus, if Hong Kong is to have a procedure for access to information, the problem of language must be solved.

Almost everyone in Hong Kong can speak some English, such as "thank you" or "goodbye," but for a large part of the population, that is where the use of English stops. Since the majority of the people in Hong Kong speak Chinese as their mother tongue, one might expect the government to communicate with the governed in Chinese. However, since Hong Kong's colonial English government needed to facilitate efficient administration, it is not surprising that in the past there has been little initiative on the part of the Hong Kong Government to use Chinese in governing. Until 1974, English was the only official language, and Chinese enjoyed no formal status in government, although it was widely used amongst the population. Therefore, all government records until 1974 are most likely in English with no Chinese translation. Such English records would not be of use to non-English speaking members of public, unless a translation of the information is provided.

The Beginning of the Use of Chinese in Government

In 1974, the Official Languages Ordinance[20] was passed. The enactment of this piece of legislation was due to pressure exerted by some interest groups and student bodies in what was known as the "Chinese Language Movement." This Ordinance provided that both English and Chinese were the official languages of Hong Kong and possessed equal status for the purposes of communication between the government and members of the public.[21] However, the same Ordinance stated in Section 4 that "[e]very Ordinance shall be enacted and published in the English language."

Therefore, from 1974 the government is required by law to communicate with the public in Chinese as well as in English. Documents, such as forms, notices, correspondence, and other official papers, issued by the government to the public would be in both the English and the standard written Chinese languages. Most of these documents, such as court forms, resumption of land notices, and tax returns, to name just a few examples, would be printed, standard forms with both English and Chinese versions. Sometimes, only the English version is complete, leaving the Chinese version to be mainly an explanation of the main points. Other government documents, including, *inter alia*, communication amongst government officials and legislation, are still solely in English.

The Onset of Bilingualism in Law

The next stage of developments came in the 1980s, starting with the Sino-British Joint Declaration in 1984. Clause 3(3) of the Joint Declaration provides that after the PRC resumes sovereignty over Hong Kong on 1 July 1997, "the laws currently in force in Hong Kong will remain basically unchanged." It is further provided in Clause 1 of Annex I that "in addition to Chinese, English may also be used in organs of government and in the courts in the Hong Kong Special Administrative Region." A provision of similar wording has been written into the Basic Law as follows:

> In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.[22]

In saying that English "may also be used" "in addition" to the Chinese language, it is obvious that the Basic Law envisages, at the time when it comes into operation, a reversal in status of the two languages – that is, the Chinese rather than the English language will become more prominent.

In response to this political reality, efforts have been made by the Hong Kong Government to put Chinese into greater use. However, to date, the only aspect in government where progress has been made in the use of Chinese is in the enactment of bilingual legislation.

To enact bilingual legislation, the Hong Kong legislature must first have the legal authority to do so. This was done in the United Kingdom by the amendment of the Hong Kong Royal Instructions, which form part of the present constitution of Hong Kong. Then in March 1987, the

Official Languages (Amendment) Ordinance[23] and the Interpretation and General Clauses (Amendment) Ordinance[24] were enacted. The former ordinance provides for the enactment of bilingual legislation from the time it comes into effect and also the procedures for the authentication of translations of existing ordinances. The latter ordinance essentially contains rules for the interpretation of bilingual legislation. The Official Languages (Amendment) Ordinance came into effect on 7 April 1989, and since then ordinances are enacted in both the official languages.

Suggested Solution

So far bilingualism in the law in Hong Kong extends only to statutes, which have always been published in the *Hong Kong Government Gazette* and are available to the general public. Other government documents, such as memoranda, records, and correspondence, continue to be produced and kept in the English language. There will inevitably be greater use of Chinese as Hong Kong's relationship with the PRC draws closer. However, if the current administrative machinery is allowed to carry on in its present form after 1997, it is conceivable that in practice English will still be the major language used.

In view of the general unavailability of records in Chinese, if the government is required to produce a translation every time a request for information is made, this will be an enormous task and may even seriously hamper the efficient administration of government. However, if a translation cannot be readily obtainable, then any individual's right of access to information exists only in theory. This is the dilemma that must be addressed if a procedure for access to information is to be devised. My suggestion is that, in the interests of the taxpayers, a translation should be provided wherever one exists and should also be mandatory in disclosing records of personal information. The reason for this is that an explanation of an English record is not difficult to obtain from someone who knows the language, but in the case of personal information, the individual may not want it to be read by other people.

Conclusion

The right to information from the government and public authorities is a valuable right in a democratic society and is a right that is guaranteed to the people of Hong Kong in its Bill of Rights. However, the right is not an absolute one. Difficult policy decisions can arise concerning

the extent of that right. There are also problems in relation to the language in which that right can be exercised. These problems should not be resolved in a piecemeal fashion when individual cases are taken to court. Therefore, the Hong Kong Government should consider enacting legislation on these issues as soon as is practicable.

Notes and References

1. S.C. 1980-81-82-83, c. 111. The Canadian and the U.S. experiences on the drafting and operation of their respective freedom of information legislation will, of course, be valuable sources of reference for Hong Kong if it decides to introduce its own Access to Information statute.

2. *Attorney-General v. Jonathan Cape Ltd.*, [1976] Q.B. 752; or the renowned *Spycatcher* case, *Attorney-General v. Guardian Newspapers* (No. 2), [1990] A.C. 109.

3. These issues have been raised by John D. McCamus in a paper entitled "How to Use the Act to Your Advantage?" (Presented at the Access to Information Act Conference, Toronto, 15 September 1983).

4. The proposals of Hong Kong Governor Chris Patten for further democratic reform of the Hong Kong Government caused much controversy and attracted strong criticism from the PRC. After a series of Sino-British talks failed in 1993 to reach an agreement on constitutional reforms and a transitional arrangement for the first legislature of the Hong Kong Special Administrative Region (HKSAR) in 1997, Patten's original proposals were introduced directly to the Legislative Council and adopted by that body on 29 June 1994.

5. Chap. IV, Arts. 45 and 68 of the Basic Law of the HKSAR; see also Annexes I and II for the methods of election of the Chief Executive and the Legislative Council up to the year 2007.

6. Laws of Hong Kong, Cap. 383.

7. Ibid., sec. 2(3).

8. Clare Beckton, "Freedom of Expression," in *Canadian Charter of Rights and Freedoms*, 1st ed., eds. Walter S. Tarnopolsky and Gerald A. Beaudoin (Toronto: Carswell, 1982), chap. 6.

9. Ibid., p. 96.

10. *Sunday Times v. United Kingdom* (1979), 2 E.H.R.R. 245.

11. As to the approach the Canadian courts have adopted towards the Canadian Charter of Rights and Freedoms, see, for example, *Law Society of Upper Canada v.*

Skapinker [1984] 1 S.C.R. 357; *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145; and the broad and liberal interpretation put on the right to freedom of expression in *RWDSU Local 580 v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573. The Hong Kong Court of Appeal has also adopted a similar approach in interpreting the Hong Kong Bill of Rights: *R. v. Sin Yau Ming* [1992] 1 H.K.C.L.R. 127.

12. See the discussion on the European Convention on Human Rights, which has similar wording, and on the ICCPR, in Beckton, "Freedom of Expression," pp. 96, 100.

13. *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* [1963] 3 All E.R. 413.

14. *Prince Albert v. Strange* (1849), 41 E.R. 1171.

15. *Duchess of Argyll v. Duke of Argyll* [1967] Ch. 302.

16. *Li Yau-wai Eric v. Genesis Film Ltd.* [1987] H.K.L.R. 711; *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345.

17. *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* [1963] 3 All E.R. 413; *Coco v. A.N. Clark (Engineers) Ltd.* [1969] R.P.C. 725.

18. *Linda Koo & John Ho v. Lam Tai Hing* [1992] 2 H.K.L.R. 314. An appeal of this case was heard by the Court of Appeal in June and dismissed in August 1993. See (1993) C.A., Civ. App. No. 116 of 1992, 25 August 1993.

19. For example, the *Spycatcher* case, see note 2.

20. Laws of Hong Kong, Cap. 5.

21. Ibid., sec. 3.

22. Basic Law, Art. 9.

23. Ordinance No. 17 of 1987.

24. Ordinance No. 18 of 1987.

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